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TABLE OF CASES.

Those marked * are not reported in the regular or official reports of the Dominion and Provinces.

A.

Abel, *Ex p.*, 502.
Abell v. Craig, 90, 296.
Adams v. Hockin, 32.
*Advocates, *In re*, 159.
Alderich v. Humphrey, 172.
Aldrich v. Nest Egg Co., 464, 499.
Alexander v. Baker, 548.
Alexander v. Irondale, Bancroft, and Ottawa R. W. Co., 24, 58.
Alexander v. McAllister, 518.
Allan v. Clougher, 330.
Allan v. Manitoba and North-Western R. W. Co., 148.
Allen v. Ontario and Rainy River R. W. Co., 288.
Alley v. Canada Life Assce. Co., 551.
Alliance Assurance Co. v. The Queen, 470.
Anderson v. Grand Trunk R. W. Co., 299.
Anderson v. Henry, 378.
Andrew v. Canadian Mutual L. & I. Co., 138.
Annapolis Election, *In re*, 517.
Armstrong, *In re*—Armstrong v. Armstrong, 80.
Armstrong v. Harrison, 112.
Arthur v. Runians, 357.
Arthur v. Yeadon, 522.
Ash Estate, *In re*, 537.
Atanasse, *In re*—Reg. v. Redner, 94.
Atkinson v. City of Chatham, 310.
Atlas Canning Co., *In re*, 454.
Attorney-General v. Parker, 534.
Attorney-General v. Temple, 507, 542.
Auchterlony v. Palgrave Gold Mining Co., 542.
Auer Incandescent Light Mfg. Co. v. Dreschel, 209.
Augberg v. Anderson, 528.

B.

Babe v. Board of Trade of Toronto, 405.
Bain v. Anderson, 284.
Baker v. Forest City Lodge, I. O. O. F., 446.
Baker v. Stuart, 174, 392.
Baker v. Trusts and Guarantee Co., 264.
Balderson v. The Queen, 209.
Bank of Montreal v. Horne, 479, 546.
Bank of Nova Scotia v. Fish, 440.
Bank of Toronto v. Ins. Co. of North America, 69.
Bank of Toronto v. Keystone Fire Ins. Co., 58, 217.
Bank of Toronto v. Quebec Fire Ins. Co., 58.
Banks v. Batton, 522.
Banque d' Hochelaga v. Maritime R. W. News Co., 89, 495, 520.
Banque du Peuple v. Trottier, 437.
Barber v. Crathern, 18.
Barker v. Lawrence, 495.
Barnes v. Gray, 537.
Barrowman v. Fader, 463, 535.
Bartram v. London Free Press Printing Co., 22.
Battisby v. Witherspoon—*In re* Forster, 83.
Bauld v. Ross, 532.
Bayne v. Eastern Trust Co., 549.
Beattie v. Holmes, *In re*, 68, 84.
Beaulieu v. Cochrane, 108, 338.
Beaven v. Fell, 474.
Bell Telephone Co. and City of Hamilton, *In re*, 287.
Bennett v. Coatsworth—*In re* Ferguson, 101.
*Bennington, *In re*, 239.

76930

Bertrand v. Canadian Rubber Co., 446.
*Bicknell v. Grand Trunk R. W. Co., 342.
Bigelow v. Doherty, 495.
Biggar v. City of Victoria, 434, 551.
Birely and Toronto, Hamilton, and Buffalo R. W. Co., *In re*, 128.
Blakeley v. Gould, 445.
Boggs v. Scott, 515.
Bollander v. City of Ottawa, 401.
Bossi, *In re*, 482, 553.
Bouchard v. George Matthews Co., 437, 505.
Boultbee v. Gzowski, 385.
Boulton v. Boulton, 334.
Boulton v. Langmuir, 448.
Bourne v. O'Donohoe, 437.
Bowes, *Ex p.*—Municipality of Westmorland, Gshees., 443.
Bowness v. City of Victoria, 519.
Bradley v. The Queen, 469.
Brereton v. Canadian Pacific R. W. Co., 63.
Brigman v. McKenzie, 549.
British Columbia L. & I. Agency (Ltd.) v. Ellis, 447, 479.
British Mortgage Loan Co., *In re*, 338.
Brock v. Benness, 265.
Brock v. Tew, 8.
Brown and Campbell, *In re*, 180.
Brown v. Grady, 458, 520.
Brown v. Town of Edmonton, 512.
Building and Loan Assn. v. McKenzie, 283.
Burland v. Lee, 275.
Burns v. Wilson, 211, 446.
*Burrell v. Blackburn, 193.
Burris v. Rhind, 477.
Burton v. Goffin, 447.
Butchart v. Doyle, 499.

C.

C., *In re*, 539.
Cadieux v. Montreal Gas Co., 303.
*Calgary, City of, and Steen, *In re*, 282.
Calhoun v. Brewster, 329.
Callaghan v. Howell, 169.
Campbell v. Doherty, 377.
*Campbell v. Dunn, 382.
Campbell v. Farley, 141, 170.
*Campbell and Village of Southampton, *In re*, 119.
Canada Life Assurance Co. and City of Hamilton, *In re*, 287.
Canada Paint Co. v. Trainor, 277.
Canada Permanent L. & S. Co. v. Traders' Bank of Canada, 308.
Canadian Pacific R. W. Co. and County and Township of York, *In re*, 48.
Canadian Pacific R. W. Co. v. McBryan, 552.
Canadian Pacific R. W. Co. v. Parke, 549, 552.
Caradoc, Township of, and Township of Ekfrid, *In re*, 511.
Card, *Ex p.*, 449, 497.
Carleton, County of, v. City of Ottawa, 510
*Carling Brewing and Malting Co. v. Fairweather, 313.
Carruthers v. Hamilton Provident and Loan Socy., 39, 121.
Carter v. Overseers of the Poor, Brookfield, 446.
Case v. Bartlett, 153, 293.
Caston v. City of Toronto, 402.
Cavanagh, *Ex p.*, 450.
Central Bank of Canada, *In re*—Hogaboom's Case, 212.
Cerri v. Ancient Order of Foresters, 53.
Chapiewski v. Campbell, 192.
Chaz v. Les Cisterciens Reformes, 271.
*Cheesbrough, *In re*, 23.
Chicoutimi, Town of, v. Price, 352.
Chisholm v. City of Halifax, 513.
Chisholm v. Peters, 457.
*Christy v. Ion Specialty Co., 85.
Chubbock v. Murray, 554.
Citizens' Light and Power Co. v. Lepitre, 350.
Clairmonte v. Prince, 460, 497.
Clark v. Keefer, 259.
*Clarke v. Webber, 314.
Clarry v. Grand Trunk R. W. Co., 13.
Clattenburg v. Morine, 464.
Coll v. Toronto R. W. Co., 50.
Commercial Bank of Windsor v. Scott, 441.
Commercial Union Ins. Co. v. Temple, 387.
Common School Fund and Lands, *In re*, 349.
Confederation Life Assn. v. Labatt, 383.
Conn v. Smith, 444, 519.
Connell v. Madden, 506.

Connolly v. Dowd, 9.
Consolidated Electric Co. v. Atlantic Trust Co., 353, 436.
Consolidated Electric Co. v. Pratt, 353, 436.
Consolidated Electric Co. Cases, *In re*, 460.
Cornwall, Town of, and Cornwall Waterworks Co., *In re*, 222.
Cornwall Waterworks Co. v. Town of Cornwall, 326.
Coursier v. Madden, 440.
Cowan v. Macaulay, 430, 434.
Cowans v. Marshall, 127.
Craven v. Williamson, 439.
Crawford v. Broddy, 376.
Crawford v. Canada Life Assurance Co., 451, 490.
Crayston v. Massey-Harris Co., 121.
Creighton v. Pacific Coast Lumber Co., 425.
Creighton v. Sweetland, 341.
Cross v. Cleary, 323.
*Cross v. Davidson, 231.
Crowe v. Craig, 549.
Culton v. Harris, 444.
Cummings v. Taylor, 278.
Cunard v. Nova Scotia Marine Ins. Co., 492.
Cunningham's Case, 380.
Cunningham v. Curtis, 444.
Cunningham v. Hamilton, 508.
Cunnington v. Peterson, 171.
Curran v. Grand Trunk R. W. Co., 396.
Currie v. Rapid City Farmers' Elevator Co., 73.
Curry, *In re*—Curry v. Curry, 235.

D.

Daniels v. Daniels, 290.
Davidson v. City of Montreal, 513.
*Davidson v. Cochrane, 183, 220.
Davidson v. Fraser, 445.
*Davidson v. Head, 260.
Davidson v. Merritton Wood and Pulp Co., 240.
Davidson v. The Queen, 469, 470.
Davis v. Ottawa Electric R. W. Co., 543.
*Davis v. Taeger, 140.
Daw v. Ackerill, 48.
Dawson v. London Street R. W. Co., 357.
Day v. Rutledge, 150, 315.
Defoe v. City of Toronto, 263.
Delap v. Robinson, 380.
Delong v. Gillis, 445.
Delorme v. Cusson, 103.
Dempster v. Fairbanks, 432.
Dickerson v. Radcliffe, 25.
Dimock v. Miller, 498.
*Doidge v. Town of Regina, 163.
Dominion Cartridge Co. v. Cairns, 275.
Dominion Coal Co. v. Kingswell S. S. Co., 556.
Dominion Cold Storage Co., *In re*—Lowrey's Case, 108.
Donaldson v. Wherry, 306.
Dorsey v. Dorsey, 261.
Douglas v. Parker, 202.
Douglas v. Stephenson, 339.
Dowler v. Duffy, *In re*, 70.
Drake v. Sault Ste. Marie Pulp and Paper Co., 232.
Duffy v. Adams, 549.
Dunlop v. Haney, 506, 519, 546.
Dunn, *In re*, 91.
Dunsmuir v. Klondike and Columbian Gold Fields, Ltd., 432, 533.
Durocher v. Durocher, 494, 545.
Dwyer and Victoria Waterworks Arbitration, *In re*, 462.
Dwyre v. City of Ottawa, 168.

E.

Eastern Trust Co. v. Forrest, 549.
*Eastman, *In re*, 379.
Eaton (Aaron) Estate, *In re*, 550.
Eckhardt v. Lancashire Ins. Co., 361.
Elson v. Canadian Pacific R. W. Co., 76.
Ernst v. Zwicker, 554.
Esquimalt Election Case, 517.
Esquimalt and Nanaimo R. W. Co. v. New Vancouver Coal Co., 474, 521.
Esson Estate, *In re*, 450, 526.
Ewing v. City of Toronto, 132, 237.

F.

Fane v. Bancroft, 456.
Farquharson v. Imperial Oil Co., 135.
Farrell v. Caribou Gold Mining Co., 454.
Fawkes v. Griffin, 51.

Feindel v. Zwicker, 472.
Fenson v. City of New Westminster, 542.
Ferguson, *In re*—Bennett v. Coatsworth, 101.
Fillis v. Conrod, 464.
Filmere v. Cartwright, 521.
Finlayson, *In re*—Finlayson v. Keith, 554.
Fisher v. Fisher, 131, 437.
Fitchett v. Mellow, 15, 280.
Fitzgerald v. Molsons Bank, 61.
*Flaschaert v. Kleinschmidt, 427.
Fleming v. Harding, 521.
Fleury v. Campbell, 181.
Flour City Bank v. Connery, 367.
Foley v. Township of East Flamborough, 60.
*Forbes, *In re*, 155.
Forster, *In re*—Battisby v. Witherspoon, 83.
Foster v. Municipality of Lansdowne, 30, 72.
Foulds v. Foulds, 384.
Francoeur v. English, 507.
Fraser Estate, *In re*, 460.
Fraser v. London Street R. W. Co., 259.
Freeman v. Mitchell, 459, 472.
*Frigean v. Collet, 459, 472.
Fulton v. Kingston Vehicle Co., 477.

G.

*Gabriels v. Ward, 71.
*Gallant v. Mellett, 199.
Garden v. Neily, 459, 470, 525.
Gates v. Lohnes, 479, 538.
Gauthier v. Jeannotte, 500.
Georgian Bay Ship Canal and Power Aqueduct Co., *In re*, 223.
Gibbons v. Cozens, 179.
Gibson v. Cook, 460.
Gignac v. Iler, 80, 392.
Gilbert, *Ex p.*, 439.
Gill v. Ellis, 550.
Gillard v. Milligan, 444.
*Gillis v. Channe Mining Co., 110.
Glanville v. Strachan, 221.
Glengoil S. S. Co. v. Ferguson, 126.
*Glenn v. Scott, 162.
Goddfroi v. Paulin, 422.
Gold Medal Furniture Mfg. Co. v. Lumbers, 64.
"Golden Butterfly Fraction" Mineral Claim, *In re*, 506.
Goodwin v. The Queen, 273.
Gould v. Blanchard, 539.
Gordon v. City of Victoria, 459, 512, 519.
Gossling v. McBride, 4.
Gourley v. McAloney, 539, 542.
Graham v. British Canadian L. & I. Co., 34, 187, 315.
Grand Trunk R. W. Co. v. Conpal, 334.
Grand Trunk R. W. Co. v. Hamilton Radial Electric R. W. Co., 456, 530.
Grant's Claim, 453.
Gray v. McCallum, 507.
Great Northern Transit Co. v. Alliance Ins. Co., 393.
Green v. Stussi, 495, 550.
Grey v. Manitoba and North Western R. W. Co., 148, 496.
Gross, *In re*, 167.
Gross v. Brodrecht, 479.
Guest v. Diack, 534.
Guild v. Dodd, 435.
Guimond v. Belanger, 501.
Guinane, *In re*, 341.
Gunter v. Williams, 491.
Gwillim v. Law Society of British Columbia, 539.

H.

*Hadden v. Hadden, 331.
Haggert v. Town of Brampton, 125.
Haight v. Hamilton Street R. W. Co., 173.
Halstead v. Bank of Hamilton, 210.
Hamilton v. Stewiacke Valley R. W. Co., 453, 496, 539.
Hamilton, Township of, *In re* School Section 16 of the, 175.
Hannum v. McRae, 354.
Harrison v. Prentice, 537.
Hart v. Cunningham, 267.
Hassard v. Riley, 494, 556.
Hawke v. O'Neil, 292.
Hawkins v. Snow, 503, 515.
Heaton v. Flood, 7.
Heiminck v. Town of Edmonton, 336.
Henderson v. Canada Atlantic R. W. Co., 397.
Henderson and City of Toronto, *In re*, 362.
*Hendrie v. Onderdonk, 258.
Hermann v. Mandarin Gold Mining Co., 23.
Hesketh v. City of Toronto, 395.

Hesselbacher v. Ballantyne, 49.
Hesslein v. Wallace, 536.
Hewett and Jermyn, *In re*, 192.
Heyd v. Millar, 399.
Heywood, *Ex p.*—*In re* Heywood v. Perry, 440.
Hickman v. Baker, 480, 525.
Hicks v. Mills, *In re*, 223.
Hill v. Broadbent, 128.
Hobbs v. E. & N. R. W. Co., 473.
Hoefner v. Canadian Order of Chosen Friends, 86.
Hogaboom's Case—*In re* Central Bank of Canada, 212.
Holden v. Hatfield, 374.
Holloway v. Lindberg, 435, 505.
Holmes v. Bready, 111, 120.
Holwell v. Township of Wilmot, 446.
Hood v. Coleman Planing Mill and Lumber Co. of Burlington, 409.
*Humphries, *In re*—Mortimer v. Humphries, 382.
*Hunter v. Hunter, 114.
Hunter v. Town of Strathroy, 191.
Hutchings v. Adams, 146.
Hutchinson v. Colby, 346.
Huyck v. Wilson, 66.
Hyde v. Lindsay, 373 .

I.

Imperial Bank v. Motton, 478.
Inch v. Simon, 34.
Inchmaree S. S. Co. v. The "Astrid," 389.

J.

Jamieson v. City of Victoria, 441.
Jardine v. Bullen, 517.
Jeffries v. Blair, 460.
Jenison and Kakabeka Falls L. & E. Co., *In re*, 396.
Jenkins v. Murray, 535.
Jermyn v. Tew, 437.
Johnson v. Fitzgerald, 556.
*Johnston v. Galbraith, 58.
Johnston v. Miller, 471 .
Johnston v. Sullivan, 329.
Jones v. Julian, *In re*, 527.
Jones v. McKean, 549.
Jones v. Pemberton, 460, 474.
Jordan v. McDonald, 467.
Jordan v. Provincial Provident Institution, 299.
Justin v. Goodison, 306.

K.

Kavanagh, *Ex p.*, 544.
Kaye, *In re*, 460.
Keefer v. Phœnix Ins. Co. of Hartford, 176.
Kelly v. City of Winnipeg, 92, 109.
Kennedy v. Beal, 288.
Kennedy v. Nealis, 538.
Ker v. Little, 395.
Kervin v. Canadian Coloured Cotton Mills Co., 47.
King v. Dupuis, 301.
King v. Keith, 422.
Kingston, City of, v. Kingston, etc., Electric R. W. Co., 397.
Kirkpatrick v. Mills, 500, 515.
Klock v. Lindsay, 300.
Knauth Nachod v. Stern, 433, 447, 465, 520.
Knock v. Knock, 548, 553.
Koksilah Quarry Co. v. The Queen, 434, 457, 542.

L.

Lafrance v. Lafrance, 87.
Lahey v. The "Maple Leaf," 390.
Laidlaw v. Lear, 400.
*Landy v. Nolan, 415.
Lang v. City of Victoria, 96, 494.
Langley v. Meir, 287.
Laughlan v. Prescott, 470.
Lawlor v. Nicol, 318.
Lazier v. Henderson, 358.
Lea v. Lang, 11.
Lea v. Wallace, 336.
Leak and City of Toronto, *In re*, 355, 510.
Le Blanc, *Ex p.*, 450.
Lefeunteun v. Beaudoin, 103.
Leggatt v. Brown, 291.
Leighton, *Ex p.*, 451.
Leizert v. Township of Matilda, 6.
Lellis v. Lambert, 486.
Lewis Estate, *In re*, 278.
Lewis v. D'Entremont, 457.
Lewis v. Doerle, 230.
Light v. Hawley, 16.
Lindberg v. City of Halifax, 519.
Lindsay v. Waldbrook, 554.
Lloy v. Town of Dartmouth, 471.
Logan, Township of, v. Township of McKillop, 394.
*Logue v. Prescott, 186.
London and Ontario Investment Co. and McKittrick, *In re*, 75.

Long v. Ancient Order of United Workmen, 129.
Loppky v. Hofley, 369.
Lott v. Cameron, *In re*, 20, 59.
Lowrey's Case—*In re* Dominion Cold Storage Co., 108.
*Lowther v. Johnson, 281.
Luckhardt, *In re*, 57.
Luffman v. Luffman, 50.

M.

Macaulay v. O'Brien, 440.
Macdonald, *Ex p.*, 449, 545.
Macdonald v. City of Toronto, 3.
Macdonald v. Galivan, 213.
Macdonald v. Lake Simcoe Ice and Cold Storage Co., 178.
Macdonald v. Trustees of Pandora Street Methodist Church, 434, 548.
Madden v. Nelson and Fort Sheppard R. W. Co., 436, 455.
Magann v. Ferguson, 137, 356.
Maguire v. Hart, 444.
Mail Printing Co. v. Clarkson, 47.
Major v. McCraney, 458.
Malcolm v. Perth Mutual Fire Ins. Co., 263, 378.
*Malone v. Mundy, 10.
Maloney v. Campbell, 210.
Malzard v. Hart, 435, 487.
Manning v. Robinson, 262.
Manufacturers' Life Ins. Co. v. Anctil, 492.
Marshall v. Matheson, 456.
Martin, *Ex p.*, 442.
Martin v. Martin, 242.
Massey-Harris Co. v. Warener, 33, 481.
Mathers, *In re*, 25.
Mathieu, *In re*, 305.
Maxwell v. Malcolm, 515.
McAskill v. Power, 448, 481.
McBride v. Hamilton Provident and Loan Society, 116.
McCann v. City of Toronto, 19.
McCauley, *In re*, 554.
McCoy, *Ex p.*, 523.
McCulloch v. Township of Caledonia, 398.
McDonald v. McDougall, 553.
McDonald v. Township of Yarmouth, 136.
McDougald v. Mullins, 432.
*McDougall Distillery Co., *In re*, 421.
*McGibbon v. Eager, 311.
McGillivray and Chesterville Public School Board, *In re*, 118.
McGregor v. McKenzie, 447.
McIlroy v. McEwan, 203.
McIntyre v. McKinnon, 472.
McIntyre v. Silcox, 344.
McIsaac v. Broad Cove Coal Co. and McKay, 267.
McKay v. The Queen, 469.
McKenzie v. Jackson, 441, 541.
McLean v. Allen, 411.
McLean v. Mills, 517.
McLellan and Township of Chinguacousy, *In re*, 404.
McLeod v. Ins. Co. of North America, 492, 549.
McMicking v. Gibbons, 508.
McMillan v. Munro, 233.
McNeil v. McPhee, 445.
Melchers and De Kuyper, *In re*, 227.
Mercer v. Neff, 359.
Merchants Bank v. McKenzie, 367.
Merritt (Charles) Trusts, *In re*, 463.
Metcalfe, Township of, and Township of Ekfrid, *In re*, 511.
Michaud, *Ex p.*, 497.
Miles v. Ankatell, 14, 391.
Miller, *Ex p.*—*In re* Miller v. Smith, 440.
*Miller v. Batty, 86.
Miller v. Cochran Hill Gold Mining Co., 524.
Miller v. Hamilton Police Benefit Fund, 283.
Miller v. Lea, 391.
Miller v. Wolfe, 547.
Minhinnick v. Jolly, 135.
Mitchell v. Kinnear, 462, 509.
Molsons Bank's Claim, 453.
Montreal, City of, v. Mulcair, 512.
Montreal and Ottawa R. W. Co. and Ogilvie, *In re*, 219.
*Moore v. Carberry, 339.
Moore v. Kennedy, 204.
Moorhouse v. Kidd, 235.
Morphy v. Fawkes, 20.
Morrow v. Lancashire Ins. Co. of England, 220.
*Morton v. Bank of Montreal, 157.
*Mothersill v. Young, 5.
Mulcahey v. Archibald, 304, 335, 538.
*Mullin v. Macklin, 309.
Munro v. Quigley, 500.
*Murphy v. Monastery, etc., of the Precious Blood, 225.
Murray v. Jenkins, 335.

Mutual Life Assce. Co. of N. Y. v. Anderson, 491.
Mutual Life Assce. Co. of N. Y. v. Jonah, 480.

N.

Neil v. Almond, 64.
Nelson and Fort Sheppard R. W. Co. v. Parker, 470.
Nelson City By-law No. 11, *In re*, 510.
Nelson Sawmill Co., *In re*, 454.
Nevills v. Ballard, 238.
New Glasgow, *In re* Town Council of, 450.
New Vanconver Coal Co. v. Esquimalt and Nanaimo R. W. Co., 489.
New Westminster Gas Co., *In re*, 454.
Nichol v. Gocher, 245.
Norris, *In re*, 442.
North Sydney Mining and Transportation Co. v. Greener, 453.
North-West Electric Co. v. Walsh, 374.
Nova Scotia Mining Co. v. Greener, 531.

O.

O'Brien v. Christie, 433, 531.
Ockerman, *In re*, 163.
O'Conner v. Gemmill, 12.
O'Conner, *In re*—O'Conner v. Fahey, 372.
O'Dell v. Boston and Nova Scotia Coal Co., 452.
O'Handley v. Dooley, 497.
O'Neill v. Hobbs, *In re*, 328.
Ontario and Quebec, Provinces of, v. Dominion of Canada, 349.
*Orford v. Fleming, 142, 241.
Orwitz v. McKay, 440.
Ostrom v. Sills, 285.

P.

*Pacific Investment Co. v. Swann, 97, 124.
Palgrave Gold Mining Co. v. McMillan, 463, 494.
Palmer v. Mail Printing Co., 62.
Paris v. Bishop of New Westminster, 459.
Parkhouse v. Dominion Lodge, I. O. O. F., 446.
Patterson v. Central Canada L. & S. Co., 81, *111.
Patterson v. City of Victoria, 512.
Payne v. Caughell, 435, 553.
Pearson v. Canadian Pacific R. W. Co., 123.
Peck, *Ex p.*, 443.
Perrault v. Gauthier, 213.
Petrie v. Machan, 55.
Phillipp v. Prout, 149.
Pictou Foundry and Mfg. Co. v. Archibald, 457.
*Pilkey v. Calder—*In re* South Ontario Provincial Election, 321.
Piper v. King's Dyspepsia Cure Co., 494.
*Pitfield v. Guest, 144.
Pope v. Cole, 550.
Pounder v. Corner, 495, 522.
Powell v. Toronto, Hamilton, and Buffalo R. W. Co., 234.
Powell v. Watters, 102.
Power v. Pringle, 522.
Powers and Township of Chatham, *In re*, 327.
Pratt v. Consolidated Electric Co., 453.
Purtle v. Heney, 534.

Q.

Quai Shing, *Re*, 460, 488.
Quintal v. Chalmers, 316.

R.

Radam v. Shaw, 547.
Rainville v. Grand Trunk R. W. Co., 231.
Raleigh, Township of, and Township of Harwich, *In re*, 78.
Rayworth, *Ex p.*, 543.
Real Estate Loan Co. of Can. v. Guardhouse, *In re*, 340.
Regina v. Buchanan, 293.
*Regina v. Carley, 26.
Regina v. Cloutier, 269.
Regina v. Conlin, 15.
Regina v. Corby, 468.
*Regina v. Crowell, 29.
Regina v. Davidson, 466.

Reg. v. Dibblee, 450, 544.
Regina v. Dixon, 468.
Regina v. Eaton Co., *In re*, 345.
Regina v. Edwards, 236.
Regina v. Fitzgerald, 134.
Regina v. Foster, 450, 526.
Regina v. Gavin, 449.
Regina v. Gibbons, 243.
Regina v. Gibson, 345, 364.
Regina v. Gordon, 467.
Regina v. Graham, 133.
Regina v. Grant, 460, 544.
Regina v. Halifax Electric Tramway Co., 88.
Regina v. Hamilton, 467.
Regina v. Hammond, 82.
Regina v. Hartlen, 468.
Regina v. Henderson, 469.
Regina v. Herrell, 297.
Regina v. Hodge, 424.
Regina v. Holmes, 113.
*Regina v. Horton, 27, 468.
Regina v. Hughes, 106.
Regina v. Kilroe, 481.
Regina v. Little, 541.
Regina v. Lyon, 289.
*Regina v. Macdonald, 70.
Regina v. Macdonald, 449, 545.
Regina v. Major, 450, 497, 502.
Regina v. McBerny, 468.
Regina v. McIntosh, *In re*, 527.
Regina v. McLeod, 463, 497, 544.
Regina v. Monaghan, 45.
*Regina v. Morris, 41.
Regina v. Ogilvie, 77, 469.
*Regina v. Pennock, 79.
Regina v. Petersky, 510, 544, 545.
Regina v. Ponton, 365.
Regina v. Poupore, 457.
Regina v. Redner, 488.
Regina v. Sivewright, 470.
*Regina v. Skelton, 205.
Regina v. Sternaman, 56.
Regina v. Stevens, 502.
Regina v. Strauss, 485, 541.
Regina v. Toronto R. W. Co., *In re*, 412.
Regina v. Troop, 466.
Regina v. Walsh, 10, 544.
Regina v. Woods, 466.
Regina *ex rel.* Hall v. Gowanlock, *In re*, 184, 215.
Reid, *Ex p.*, 526.
Reilly v. McIlmurray, 105.
Renehan v. Malone, 554.
Renfrew Estate, *In re*, 194, 324.
Rennie v. Frame, 342.
Restigouche Dominion Election, *In re*, 518.
Rhodenhizer v. Bolliver, 485.
*Ribble v. Aldwell, *In re*, 59.
Rice v. Town of Whitby, 231.
Richards v. British Columbia Gold Fields Co., 475.
Rideout v. McLeod, 540.
Riou v. Riou, 104.
Rithet v. Beaven, 448.
Ritz v. Schmidt, 152.
Roberts v. Coughlin, 138.
Robertson v. McKeigan, 501.
Robertson v. Trustees of School District No. 2, Parish of Durham, 536.
Roden and City of Toronto, *In re*, 54.
Roudot v. Monetary Times Printing Co., 237.
Roper v. Hopkins, 325.
Ross v. Adams, 480.
Routledge v. Routledge, 479, 487.
*Rowan v. Toronto R. W. Co., 130.
Rudolf v. British and Foreign Marine Ins. Co., 492.
Ruthven, *In re*, 467.
Ryan v. McNichol, 465, 506.

S.

San Francisco Mining Co. v. Martin, 460.
Sands v. Fisher, 495.
Saunders v. City of Toronto, 136.
Sawyer and Massey Co. v. Parkin, 55.
Scarry v. Wilson, 294.
Schnare v. Zwicker, 472.
Scottish Ontario and Manitoba Land Co. v. City of Toronto, 263.
Seli v. Smith, 407.
Seyfang v. Mann, 214.
Shannon v. Montreal Park and Island R. W. Co., 438, 529.
Sherlock, *In re*, 2, 555.
Sherwood v. Balch, 406.
Simcoe, County of, v. Burton, 392.
Simpson v. Palliser, 351.
Sinclair v. Brown, 239.
Slattery v. Dun, 312.
Slauenwhite v. Archibald, 487.
Small v. Thompson, 211.
Smedley v. British America Ass. Co., 184.
Smith Assessment Appeal, *In re*, 434, 442.

Smith v. Boyd, 107.
Smith v. City of Vancouver, 512.
Smith v. Hayes, 134.
Smith v. Onderdonk, 130.
Smith v. Smith, 170.
*Smith v. Smith, 423.
Smith v. St. John City R. W. Co., 353, 436.
Smythe v. Martin, 359.
Snow v. Fraser, 548.
Sombra, Township of, v. Township of Chatham, 101.
Sonier, *Ex p.*, 449.
Solicitor, *In re*, 224, 261, 337.
Solicitors, *In re*, 307.
*South Ontario Provincial Election, *In re*—Pilkey v. Calder, 321.
*South Perth Provincial Election, *In re*, 255.
Sparks v. Wolff, 286.
St. Denis v. Shoultz, 129.
St. Lawrence Sugar Refining Co. v. The Queen, 469.
St. Margaret's Church, Wardens of, v. Stephens, 132.
Stamford, Township of, v. Village of Niagara Falls, 404.
Star Life Assce. Socy. v. Southgate, 229.
Steele v. Pioneer Trading Corpn., 496.
Stephens v. Township of Moore, 54.
Stevenson v. Boyd, 457.
Steves v. District of South Vancouver, 512, 548.
Stewart v. Anderson, 528.
Stewart v. Snyder, 407.
Strong v. Bent, 504, 521.
Stuart v. McVicar, 403.
*Styles v. Michigan Central R. R. Co., 5.
Styles v. Supreme Council of Royal Arcanum, 19.
Supreme Legion Select Knights of Canada, *In re*, 380.
*Sutherland v. Dangerfield, 18.
*Sutherland v. German, 180.
*Sutherland Mines Co. v. Township of Romney, 342.
Synod of Diocese of Toronto v. Fisken, 399.

T.

Tate v. Natural Gas and Oil Co. of Ontario, 115, 187.
Taylor, *In re*, 488.
Taylor and City of Winnipeg, *In re*, 31.
Taylor v. City of Winnipeg, 347.
Teasdall v. Brady, *In re*, 181.
Teetzel v. Dominion Construction Co., 1.
Templeton, *Re*, 534.
Tew v. Neill, 333.
Thackeray v. Township of Raleigh, 236.
Thibaudeau v. Scott, 30.
Thompson v. Brantford, etc., Electric Co., 453.
Toronto, City of, v. Toronto R. W. Co., 437.
Toronto Brass Co., *In re*, 413.
Toronto Railway Co.'s Assessment, *In re*, 131.
Torrop v. Imperial Fire Ins. Co., 489.
Towne v. Brighouse, 502.
Townsend v. O'Keefe, 241.
Troup v. Kilbourne, 507.
Tyrrell v. The Queen, 389.
Tytler v. Canadian Pacific R. W. Co., 327.

U.

Union Bank of Canada v. Barbour, 200.
Union Colliery Co. v. Attorney-Gen'l for British Columbia, 438.

V.

Vadeboncoeur v. City of Montreal, 386.
Vanbuskirk v. McNaughton, 499.
*Verney v. Guthrie, 413.
Viau v. The Queen, 352.
Videan v. Westover, 17, 83.

W.

Wakefield v. Turner, 531.
Walker v. Gurney-Tilden Co., 401.
*Walls v. Sault Ste. Marie Paper and Pulp Co., 117.
Ward v. City of Toronto, 360.
Ward v. Wilbur, 233.
Warren v. Van Norman, 66, 290.
Washington v. Grand Trunk R. W. Co., 125.
Watson v. Dandy, 154.
Weatherbe v. Whitney, 439, 441, 452, 506.
Webster v. Crickmore, 129.
Weller v. Carnew, 178.
Weller v. Shupe, 506.

Wentzel v. Ross, 535.
*West Elgin Provincial Election, *In re*, 249.
*West Huron Provincial Election, *In re*, 241.
*Wheatley v. City of Charlottetown, 188.
Whitford v. Zinc, 481.
Whitla v. Phair, 145.
Wier, *In re*, 507.
Williams v. Bartling, 514.
Wilson v. Boulter, 182.
Wilson v. Lyman, 232.
Wilton v. Murray, 37.
Winch v. Traviss, 143.
Winnipeg, City of, v. Canadian Pacific R. W. Co., 370.
Wood v. Gibson, 477.
Woodburn v. The Queen, 77.
Worden v. Rawlins, 462.
Wright, *Ex p.*, 456, 466, 468.
*Wright v. Calvert, 218.
Wright v. Mitten, 552.
Wright v. Polson, 458.

Y.

Yelland v. Yelland, 130.
Young, *In re*, 363.
*Young v. McIsaac, 42.
Yule v. The Queen, 228.

Z.

Zirkler v. Robertson, 506, 515, 522.
Zweig v. Morrissey, 494.
Zwicker v. Ernst, 554.

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PURCHASE OF LAND UNDER LEASE.

LEAVING out of consideration, as an unknown quantity, the effect of the recent legislation upon the nature and effect of a lease, the purchase of land which is under lease presents some interesting features, at any rate in the development of the reasoning.

If a purchase is made of a "reversion," or a "reversionary interest" simply, the purchaser, of course, knows that he is not getting a present interest. The position of a purchaser in such a case would depend largely upon the peculiar circumstances of such a case, and not a little on the remedy sought for. It being the duty of the vendor to correctly describe the nature and extent of the interest which he is selling, if it can be imagined that a purchaser should sign a contract to buy without knowing the extent of the particular estate, the vendor might have great difficulty in enforcing specific performance, especially if the purchaser on further inquiry ascertained that he was to get something very different from what he supposed he was contracting for. The purchaser, on the other hand, might well claim specific performance, and the vendor might be told that if he chose to be so vague in his description he should not complain if people took advantage of his offer as he made it. But a purchaser asking specific performance with compensation would probably be refused it for his carelessness in not making inquiries as to what he was buying.

In these cases the peculiarity of the remedy and its application affect the whole situation, the subject matter of the contract—a reversion—not being in dispute.

But where the purchaser, intending to buy a fee simple in possession, contracts to buy the land simply, which imports the ultimate transfer of a fee simple absolute in possession, and it transpires that the land is subject to a lease, so that the vendor can only convey to him a reversion, and not a present estate, the matter assumes other aspects. That it is affected by the peculiar circumstances of each case, and by the particular remedy resorted to, is no doubt true, but in this case there is or may be a dispute as to the subject matter contracted to be sold. Conditions of sale are not necessarily, nor indeed usually, expressed in the technical language of conveyancing, as Pollock, B., pointed out in Phillips v. Miller (*a*), and there is ample scope for error where the interest to be sold is not well described. And again, the purchaser may have knowledge of such facts as put him on inquiry, and bind him in equity to do something which may not be apparent on the face of the contract.

The matter naturally presents itself for consideration in two aspects which are found in the decided cases: 1. The relation of the purchaser to the tenant, and 2. The relation of the purchaser to the vendor. The first can only arise after the conveyance of the estate; for, plainly, the purchaser has recourse to the vendor for remedies of all kinds affecting the estate pending contract.

1. As between the purchaser and the tenant. If the purchaser buys with notice, he is of course charged with all the obligations to the tenant, binding the land, by which the vendor was bound. In 1794, Lord Loughborough said: "It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year

(*a*) L. R. 10 C. P. at p. 432

to year, was bound by a lease that tenant had which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests as to the extent and terms of which it was his duty to inquire" (*b*). In this case the bill was by a tenant against the purchaser, claiming a renewal of a lease the terms of which the purchaser denied knowledge of.

Again, in Hall v. Smith (*c*), it was said, "When a lease is stated, it is the business of the party to look at it; and to see whether there is any covenant that may materially influence his judgment as to the value. If the circumstance that the land is in lease had been concealed, that would be a different consideration; but, upon analogy to other cases, if the party had notice that the estate is in lease, he has notice of everything contained in the leases; if, for instance, there is a covenant to renew, the purchaser cannot object that he had no notice of that particular covenant."

In Daniels v. Davison (*d*), a tenant was in possession with an agreement to purchase. The owner sold to a stranger at an advance. And the tenant brought the suit against the owner and the purchaser for specific performance of the agreement to sell to himself. Argument took place on the effect of the purchaser's plea of purchase for value without notice, to sustain which he had to prove that his vendor was seised and was in possession. The possession by his tenant would satisfy this; but where the tenant had an agreement to buy, and elected to stand upon it, the purchaser could not sustain his plea, for the vendor would thus not be in possession. The case was determined in favour of the tenant, the Lord Chancellor saying, "Where there is a tenant in

(*b*) Taylor v. Stibbert, 2 Ves. at p. 440.
(*c*) 14 Ves. at p. 433.
(*d*) 16 Ves. at p. 254.

possession under a lease or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact, that he is entitled to that term, if he does not choose to inquire into the nature of his possession; the tenant being in no fault, but enjoying according to his title. Then, if in the instance of such a term, the tenant would be entitled against a purchaser, why is not his title good for a greater interest? In the case of Douglas v. Witherwrong (*e*), the tenant was not bound to know, and did not know, that it was necessary for him to make any communication of the option which he had by the contract with his landlord to become the purchaser; and Lord Kenyon held that there was nothing that could affect his conscience in favour of a purchaser having no communication with him. My opinion, therefore, considering this as depending upon notice, is that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity respecting the claim of a subsequent purchaser who made no inquiry as to the nature of his possession."

This case has been said to be an extreme case (*f*); and in a case of Myles v. Langley (*g*), the Court refused to extend its doctrine to the extent of requiring a purchaser to pursue inquiries as to the nature of the interest of a person who had lately been in occupation.

It was followed, however, in Bailey v. Richardson (*h*), where the Vice-Chancellor said: "The principle of Daniels v. Davison is that a purchaser, having notice that another is in possession, is not justified in assuming the possession of that person to be the possession of the vendor, but is bound to make inquiry of the person in possession; and that principle reaches the present case,

(*e*) 1 Cox, 167, *sub nom.* Lawes v. Bennett.
(*f*) Jones v. Smith, 1 Ha. at p. 62.
(*g*) 1 R. & My. 39.
(*h*) 9 Ha. at p. 786.

whether the possession was in Richardson or his under-tenants."

So far, the question has been considered between purchaser and tenant only, and, as we have seen, it depends entirely upon notice. Notice of the tenant's possession is notice of his lease, and puts the purchaser on inquiry to find out the terms of the lease. But, while the possession of the tenant is notice of the lease and all the terms of it, it is not notice of a collateral agreement affecting the tenant, or even the terms upon which he may hold the land. There is no practical distinction for a purchaser, for as he takes at the risk of what he may find on inquiry, he must always make the inquiry. Indeed, so much difficulty was experienced in Phillips v. Miller (*i*), in determining whether an agreement was collateral to a lease or not, that a purchaser could hardly be expected to satisfy himself. In that case, the tenants of the estate claimed against devisees in trust for sale that the testator had promised to renew their leases. Though not bound by the promise, the devisees agreed with the tenants that if they would quit possession on a certain day they would be paid for what they left on the farms at "market price" instead of at "fodder price," which was according to local custom. In the Court below, it was held that a purchaser with notice of the leases, but without actual knowledge of this agreement, was bound by it; but on appeal it was held that he was not, because it was a personal agreement collateral to the leases, and not one of the terms of the leases. No other or additional interest in the land passed by it, or was intended to pass by it, but the only estate held by the tenants was under the leases to which the agreement was collateral.

The result of these cases is well summed up in Barnhart v. Greenshields (*j*): "The principle being . . . that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary

(*i*) L. R. 9 C. P. 196; 10 C. P. 420.
(*j*) 9 Moo. P. C. at p. 32.

rule, either to inquire what that interest is or to give effect to it whatever it may be. This is the doctrine to be collected from the judgment of Lord Rosslyn in the case of Taylor v. Stibbert (2 Ves. Jr. 437), and from the earlier authority to which he refers; and the decision itself and the principles on which it is rested are referred to with approbation by Lord Redesdale in his judgment in Crofton v. Ormsby (2 Sch. & L. 583). The language of Lord Eldon in Daniels v. Davison, which was decided in 1809, is to the same effect; and when some years afterward, in Allen v. Anthony, he had occasion to consider the subject he states the rule in these words: 'It is so far settled as not to be disputed that a person purchasing, when there is a tenant in possession, if he neglects to inquire into the title, must take subject to such rights as the tenant may have'" (*k*). But where a purchaser entered into a contract to buy an estate "now or lately in the several occupations of H. R. and others," the purchaser to be "let into the receipt of the rents and profits," it was held that he was not charged with notice of the existence of leases for lives (*l*).

As before observed, these cases arose after conveyance, and depended entirely upon notice. Indeed, when they are stated shortly as to their legal effect, they are no more than the application of the rule, or rather the truism, that if a purchaser buys an estate with notice that a third person has already an estate in the land conveyed to him, and is in possession and enjoyment of it under his conveyance, the purchaser takes subject to it.

Under our system of registration, however, we must beware of applying these cases. But for the fact that they are made the basis of discussion and decision in a case to be presently referred to, they would not have been noticed. The Registry Act requires certain leases

(*k*) See also Wilbraham v. Livesey, 18 Beav. 206, where it is said: "If a contract be entered into to purchase an estate which is in the possession of a tenant who holds at the time under a lease, the purchaser has notice of the lease and all the covenants contained in it," referring to Daniels v. Davison; Penny v. Watts, 1 Mac. & G. 150.

(*l*) Hughes v. Jones, 3 D. F. & J. 307.

to be registered in order to preserve their priority. Others, not requiring registry, are valid provided that possession is held under them. If, therefore, a purchaser completes his contract, and takes a conveyance subject to a lease which requires registration, and is in fact registered, he necessarily takes subject to it. If the lease (still requiring registration) is not registered, the possession of the tenant alone is not that actual notice which is required by our registry laws in order to charge a purchaser for value (*m*); the unregistered lease or deed being fraudulent and void as against a purchaser for value without actual notice of it, the possession under it is also necessarily fraudulent and void as against the registered purchaser (*n*). In other words, the possession does not require the purchaser to pursue his inquiries. But here again the purchaser is unsafe if he knows of the possession. Theoretically he need not inquire if the lease is one requiring registry, but is not registered. But the purchaser cannot assume that, and if he knows it as a fact he has notice and takes subject to it. The possession may be a possession under a lease not requiring registry; and in that case he is bound by notice of the possession. For, in the case of a lease not requiring registration the possession of the tenant under the lease, that is during its currency, is equivalent to registration, and is therefore actual notice to the purchaser (*o*). The doctrine of the English cases cited then applies only partially, that is where the tenant has nothing to do in order to perfect his title. If he has to register in order to retain priority, and omits to do so, then an innocent purchaser will take by a better title than the unregistered tenant has.

In closing the citation of cases upon the first branch of the subject we cannot do better than refer again to the remarks of the Privy Council upon them. In the case cited (*p*), it is said: "The last case on the subject,

(*m*) Harty v. Appleby, 19 Gr. 205; Sherbonneau v. Jeffs, 15 Gr. 574; Grey v. Ball, 23 Gr. 390; Roe v. Braden, 24 Gr. 589.

(*n*) Waters v. Shade, 2 Gr. at p. 464.

(*o*) Davidson v. McKay, 26 U. C. R. at p. 310.

(*p*) Barnhart v. Greenshields, 9 Moo. P. C. at p. 33.

Bailey v. Richardson (9 Ha. 734), rests on precisely the same principles; and although in the argument at the Bar it was suggested that the language of the learned Judge in that case goes further, and lays down that it is the duty of a purchaser to make inquiries of a tenant in possession, not only for the purpose of protecting himself against any interest of the tenant, but for the purpose of guarding against interests of other persons; it is clear from the context that such is not the meaning of the words used, and we know from the learned Judge himself, that he had no intention of laying down any such doctrine." And again, "In all the cases to which we have referred it will be observed that the possession relied on was the actual occupation of the land and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on."

2. As between purchaser and vendor. The closing words of the last paragraph would prepare us for an entirely different rule between vendor and purchaser while the contract is in fieri. And it is therefore with some surprise that we find the principle of the decisions just referred to applied to the case of a pending contract.

In James v. Lichfield (*q*), a memorandum was signed between vendor and purchaser for the sale of five houses and six acres of land, which provided that a formal contract for carrying out the sale should be entered into as soon as it could be drawn up. The purchaser paid his deposit, and the vendor's solicitor afterwards drew up a draft of the contract and sent it to the purchaser's solicitor, by which it appeared that the land and one of the houses were under an agreement for a lease to one Allen. The purchaser knew that Allen was in occupation, but did not know that he was in under an agree-

(*q*) L. R. 9 Eq. 51.

ment for a lease, or in any capacity but perhaps a tenant from year to year, until informed by the draft contract. On a bill for specific performance with an abatement from the purchase money, Lord Romilly, M.R., said: "The plaintiff in his evidence does not deny that he knew that Allen was the tenant of this property, and the real question to be determined is, whether this knowledge put him on inquiry to learn from Allen the nature, extent and character of his tenancy. The case of Daniels v. Davison determined that, as between the tenant himself and the purchaser, the purchaser was bound to inquire, and could not dispute the tenant's right. Does that duty apply to the case between vendor and purchaser as well as between purchaser and tenant? I have found no case exactly in point, but the principle appears to me to be the same, and to be applicable to both cases. Why is the purchaser bound to inquire as regards the tenant, and yet not bound to inquire as regards his rights against the vendor? The principle is thus stated in argument in that case, 'Whatever puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest.' This was adopted by the Lord Chancellor, who decided accordingly, and I am unable to see any ground for a technical, and as it appears to me, an arbitrary distinction, which should limit the application of the rule to one person, when the reason of it extends to all persons whatsoever. If the purchaser, knowing of the tenancy, is bound to inquire, as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be so bound as regards the vendor? And if the purchaser choose to bind himself by agreement with his vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think, also, that no distinction can properly be drawn in a Court of Equity, on the ground that the

matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice; and those things which necessarily flowed from, and were incidental to, that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was unless he was willing to be bound by the tenancy, whatever it was."

We have quoted at length from this case, for the purpose of showing the course of reasoning, and we feel bound to say that it does not convince. There is not a word in it that would not apply to the circumstance of any other burden capable of being removed or compensated for. If we substitute incumbrance or defective title for tenancy, the proposition laid down would immediately be declared to be unsound, that a proposing purchaser choosing to bind himself by contract knowing of an incumbrance or a defect in the title would take subject thereto if he did not prosecute inquiries. And the case of a tenancy is the same. Whether described as a burden, as a defect in the title, or whether the contract, omitting mention of it, is said to contain a misdescription ought to make no difference. The contract implies equally that the vendor will give possession, and that he will make title, remove incumbrances and convey the very thing described. Such cases must be distinguished from cases such as those mentioned by Fry, J., in Re Gloag and Miller's contract (*r*): "If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown." But such cases must be rare. And mere knowledge of a defect "is not sufficient to deprive the purchaser of his right; for he may buy knowing that the property is incumbered up to the hilt, but he does not take a conveyance subject to the incumbrance" (*s*). And it may well be that a purchaser en-

(*r*) 23 Ch. D. at p. 327.

(*s*) Cato v. Thompson, 9 Q. B. D. at p. 620.

ters into the contract on the supposition that defects or incumbrances of which he knows will be removed (*t*).

To hold otherwise, except in a glaring case, would be to lay down the proposition that before a purchaser can with safety sign a contract he must, if he knows anything about possession (not being in the vendor) or other depreciatory circumstances, make the most careful and exhaustive inquiries, instead of relying upon a contract which on its face obliges the vendor to give a good title in fee simple in possession free from incumbrances.

Again, the statement that the purchaser is in no different position pending the contract than after it has been executed by conveyance, if intended as of general application, is unsound. Many familiar instances could be given of rights of purchasers pending contract, which are completely lost or merged in other different rights by the acceptance of a conveyance. It is familiar law that a purchaser may, pending the contract, procure the removal of incumbrances which would not be within the scope of the covenant against incumbrances if he accepted his purchase deed without insisting upon his right. "It is commonly said," says Bowen, L.J., in Palmer v. Johnson (*u*), "that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract." The exceptions are set out in the following passages. And in that case a contract for compensation for misstatement was held to live after the execution of the deed. But the rule, no doubt, is correctly laid down. It is quite possible then, in fact it is of frequent occurrence, that a purchaser may conclude himself by accepting a conveyance from requiring the vendor to do something which he had a perfect right to ask for during the contract. It cannot then be accepted as sound reasoning that, because a purchaser chooses to accept his conveyance without seeing to it that he gets possession, therefore he is concluded

(*t*) Ellis v. Rogers, 29 Ch. D. at p. 671.
(*u*) 13 Q. B. D. at p. 357.

before the conveyance, simply because he knew of something that would have led to more certain knowledge had he followed it up before signing his contract. What right, in any event, would a proposing purchaser have to be making inquiries respecting property merely on the chance that he might buy ?

Again, the relation between the purchaser and the tenant is entirely different from that between purchaser and vendor. The vendor owes certain well-defined duties to the purchaser. The tenant owes none. Secure in the possession of his estate, he need make no communication to the purchaser, while the vendor is bound to inform the purchaser of what he proposes to sell him, under pain of the consequences of misdescribing his land. The two relationships may be described by the familiar mode of illustration, as the one resting on contract, the other on status. To say that the purchaser is under the same duty to the vendor as to other persons is too sweeping. He may know of a mortgage, and, if he intends to take subject to it, he must inquire of the mortgagee how the account stands. But, if he has no such intention, it would be absurd to say that, because he would take subject to it if he completed, he must, therefore, take subject to it as against the vendor. To say that he must complete subject to a lease of which he knows, because he would take subject to it if he completed without seeing to it, is an equally absurd conclusion. The question put by his Lordship, " Why is the purchaser bound to inquire as regards the tenant, and yet not bound to inquire as regards his rights against the vendor ?" does not exactly meet the situation. It begs the question. The consequence of not inquiring of the tenant is that, if he completes without inquiry he will be in the same position with regard to the tenant as if he had made the inquiry. But by Lord Romilly's reasoning, he is bound, as against the vendor, to complete subject to the lease. What good will the inquiry then do ? And if he does inquire of the tenant, what good will it do him when he comes back to the vendor, if he is bound to take subject to the lease because he knew of an occupation, the terms of which he

was ignorant of when he signed the contract? The reasoning is inconclusive. It depends upon the statement that the relation of the purchaser to the vendor is the same as the relation of the purchaser to all persons to whom the vendor may be under obligation. If the purchaser has a contract to convey a fee simple, he need not make any inquiries of the vendor, because to do so would merely resolve itself into the question, are you going to carry out the contract?

We must be understood in the foregoing remarks to direct them exclusively to the state of facts arising in James v. Lichfield. No doubt, as we have pointed out, if the purchaser entered into a contract knowing of an existing lease, and knowing that he could not get possession, he would be in the position put by Fry, J., in Re Gloag and Miller's contract.

The matter arose again in Caballero v. Henty (*v*). The facts were as follows: The conditions of sale of a public house and several cottages described the property as "The General Abercrombie . . as the same is now in the occupation of Mr. T. W. Slatter at the low rental of £20 per annum, together with the two cottages at the back, each let at 2s. per annum, as the same now are in the occupation of Burnand and Stilwell," and that "the properties are sold subject to the several tenancies now existing." The defendants were brewers, and desired to buy the public house for the purpose of extending their business. The public house was at the time of the sale under lease to a brewer for twenty-one years, having nine years to run. This lease was read at the auction by the auctioneer, but the defendants' agent who bid for the property did not hear it on account of the noise. The public house was knocked down to the defendants, and their agent signed a contract which contained no reference to the lease. It will be noticed that the circumstances of this case are almost identical in essentials with those of James v. Lichfield. The contract was silent as to the lease, but there was

(*v*) 9 Ch. App. 447.

[illegible] of a case which, according to that case and others of the property purchased upon notice of its title is to the real state of affairs under which the sale is effected. When the doctrine was introduced the purchaser and vendor appeared to be at issue in respect of the case stating the tenancy referred to in the conditions of sale. After some correspondence a copy of the case to the lessee was sent, and the latter refused to surrender. A bill for specific performance was filed, and dismissed by the Master of the Rolls. On appeal Lord Justice James said: "There is no pretence for the case made by the plaintiff that a person who wants to buy such property, and has notice of the existence of a tenant, is bound to go and inquire of the tenant what is the nature of his tenancy." In this proposition James v. Lichfield was cited as an authority. It is true there remain to us some dicta which seem to go to that extent, and which support the notion that the doctrine of Dimes v. Grand Junction applies as between vendor and purchaser, and whilst the matter still rests in authority it is not necessary now to deal with that case, nor I am not at present prepared to assent to any such proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired you would have found out all about it." Lord Justice Mellish agreed on the ground that there had been a misdescription of the property, disentitling the vendor to a decree for specific performance.

The principles of this case, it will be noticed, are entirely different from those which Lord Romilly applied in James v. Lichfield. The peculiar obligations of the vendor during the contract are given effect to, and the concluding words, so often met with in various forms in

conveyancing cases, are only an additional application of the rule that the vendor is not relieved of his duties because it happens to be in the power of the purchaser to do for himself what the vendor ought to do or have done. The closing words of Lord Justice James' judgment forcibly recall the Ontario case of Barr v. Doan (*w*). In that case the plaintiff, an ignorant man, having mortgaged his land to the defendant, and being unable to pay the mortgage, asked the defendant to buy it. The defendant offered him other land, and a mortgage which he held, and which he represented to be a second mortgage, but which was in fact a fourth mortgage, and worthless. The defendant further represented that the mortgage would be cashed at a small discount by any money lender. Before completion, a Registrar's certificate of the title of the land on which was the mortgage which was offered was handed to the plaintiff, but he did not observe from it or understand that it showed the mortgage to be a fourth mortgage. And having been delivered after the untrue representations were made, and without his attention being called to the untruth, it was held that this did not relieve the defendant. The jury found in favour of the plaintiff in an action of deceit, and the Court agreed to set aside the verdict. The principle upon which the Court proceeded was identical with that mentioned by Lord Justice James. The defendant being under an obligation to truly describe to the plaintiff what he proposed to sell to him, it was no defence to an action based on the untrue representation that the plaintiff might have found out its falsity if he had been diligent enough. It is true that the principles governing an action of deceit are not identical with those governing the relation of vendor and purchaser, but if anything, they are narrower. At any rate they are like enough to be included within the proposition that a person owing a duty to another cannot escape from the performance of it because the person to whom he owes it had the means, if he chose to exercise them, of performing them for himself. The vendor being bound to

(*w*) 45 U. C. R. 491.

properly describe his property, and being also obliged to convey the thing described, the purchaser is entitled to rely on the performance of his duty by the vendor, and to assume the ability of the vendor to carry out his contract, though he may in fact know of something which may possibly render it difficult for the vendor to perform it.

Viewed in this light, it would seem that, as between vendor and purchaser, while the contract is in force, and in the absence of special circumstances such as those mentioned by Fry, J., in Re Gloag and Miller's contract, the purchaser is not bound to complete, except at his own election, and with an abatement in the purchase money if entitled thereto, if it transpires that the occupant of the land is there under a lease.

EDITORIAL REVIEW.

New Year's Honours.

Amongst the recipients of New Year's honours we are glad to see the name of the Chief Justice of Ontario, who has received the honour of knighthood.

The Rule in Shelley's Case.

The rule in Shelley's case is probably the most robust specimen of conservatism known to the law. It has been joked about, inquired about, knocked about, criticized, lauded, quarrelled about, despised, respected, but never reversed. It is as vigorous as ever it was; one would like to say, it is as vigorous in its old age as when it was born; but no one seems to know when it was born, how old it is, where it came from, or why it exists. Yet no one would dare to depart from it; and probably no man living could, or would if he thought he could, draw an Act of Parliament to rescind it. One is in doubt whether to honour it and its descendants and collaterals for their antiquity, or look askance at it as nullius filius, and condemn its brood with it, because its origin is unknown. It is as great a puzzle as Cain's wife.

The reflection has no doubt passed through the mind of more than one lawyer that when the case of the unfortunate poet of the name came before Lord Eldon, the junior Bar present must have indulged in sundry jokes about the rule in the original Shelley's case.

Its latest role is to furnish the ground for some most humorous remarks made by Lord Macnaghten in Van Grutten v. Foxwell, L. R., 1897, A. C. at p. 668, which we make no excuse for reproducing. "The rule has a curious history. No one can tell who its author was. . . . No one knows for certain how it came to be laid down. Even the purpose of its being has been the subject of controversy. . . . One very learned writer is of opinion that its main object was to exclude the

possibility of creating 'an amphibious species of inheritance,' calculated to introduce confusion and disorder into the system of our law. . . . Whatever may have been the origin of the rule, and whatever may be its mode of operation, it cannot, I think, be denied that the rule was accepted without question in the earlier period of its existence. . . But before the time of Jesson v. Wright there had come a change. Things were not going well with the rule. Its feudal origin was a disgrace. Its antiquity was a reproach. Some Judges thought that on these grounds it ought to be 'discountenanced.' . . . It was always being disparaged, and, what was perhaps worse, it was always being explained. It led to profound discussions and to some very pretty quarrels. One object of Mr. Fearne's famous work was to refute Lord Mansfield's heresies in Perrin v. Blake, then under appeal to this House. Unfortunately, in a later edition the author suggested or proved that Lord Mansfield had not always been true to his own mistaken creed. That, of course, was an imputation not to be borne: it was resented and repelled from the Bench: Hodgson v. Ambrose; and so Lord Mansfield and Mr. Fearne differed and quarrelled. Lord Thurlow and Mr. Hargrave agreed in everything, and they quarrelled too. They had been friends. 'The rule in Shelley's Case,' so Mr. Hargrave tells us (3 Juriscon. Ex. 406), 'had often been discoursed upon' between them. Their friendship stood that strain. But when Mr. Hargrave laid the fruits of his labours before Lord Thurlow, and proposed to introduce a complimentary reference to the Chancellor, who had shown in Jones v. Morgan that he once enjoyed a vision of the true doctrine in its primitive simplicity, Lord Thurlow felt it was time to draw back. He acknowledged the imperative character of the rule. On that point he was as sound as Mr. Hargrave himself, whose treatise would have borne the proud motto, 'Aut Cæsar aut nullus,' but for fear that some unkind critic might misread the allusion and mock the author. So far these great lawyers were at one. But Lord Thurlow thought that Mr. Hargrave was making too much fuss about his work of

discovery or restoration, and he was not, I fancy, altogether certain what part was being reserved for the Lord High Chancellor, whether he was to come in as the master or the disciple. At any rate, his reply was cold and distant. He sends best respects to Mr. Hargrave. 'For himself,' he writes (3 Juriscon. Ex. 360), 'he really does not remember the time when he thought the application of the rule in Shelley's Case could depend upon anything else but the question whether the word "heirs" was the designation of some particular person, or included successively all who might pretend to inheritable blood.' That was putting the case in a nut shell.

But it is one thing to put a case like Shelley's in a nut shell and another thing to keep it there." And so on.

A more serious phase of the case from which we have quoted is to cast discredit upon the case of Montgomery v. Montgomery, 3 J. & Lat. 47. This case, though, or perhaps because, a decision of Lord St. Leonard's has been a puzzle and a stumbling block. It has been frequently cited, but its practical influence has never extended beyond itself. Lord Macnaghten says of it, at p. 673, "The most disappointing case of all, I think, is the Irish case of Montgomery v. Montgomery, before Sir Edward Sugden in 1845, on which Mr. Haldane so much relied. Everybody must acknowledge Sir Edward Sugden's profound learning. . . . Perhaps the editor of Gilbert on Uses would have preferred that something should have been left of the old labyrinth through which he, at least, knew his way in the dark. His observations in Montgomery v. Montgomery, as he tells us, were made 'with a view to clear up the doubts on this branch of the law.' The result was unfortunate. No difficulties were cleared up, no doubtful points explained, and Montgomery v. Montgomery is never cited except when it is desired to minimize the effect of Jesson v. Wright, and it is always cited then."

"Joe Bowers."

Whether the Legislature of Missouri was serious or not in passing the Act for the glorification of Joe Bowers, it is difficult to say. The style of the preamble

is not uncommon in serious subjects. In fact, the superlative degree probably represents the ordinary plane of speech, while the comparative degree is seldom used but as an alternative form of the superlative. Judging from this, and from the fact that the Legislature did not think fit to provide the funds for Joe Bowers' monument, but enacted that they should be raised by voluntary contributions, we should say that the Legislature was serious. But from the internal evidence afforded by the preamble, Joe Bowers may never have existed, and it is difficult, on this account, to suppose that the Legislature desired to do anything more than erect a monument more lasting than brass to itself as the embodiment of the type which it worships. Anyway, the preamble is a curiosity. Here it is:

"Whereas, the true-hearted and illustrious Joe Bowers, late of Pike, has done more than any thousand other men, living or dead, real or imaginary, to advertise the great state of Missouri and her splendid people, causing our name and fame to be sung and rung in every clime, on every sea, in every land; and

Whereas, his soul-stirring ballad, beginning 'My Name it is Joe Bowers,' has served to rekindle patriotism and to foster paternal and filial devotion in the heart of every true Missourian at home and abroad, as well as to enlist for us the sympathy, interest and respect of all men of genuine worth the world over, and the admiration of all women whose admiration is worth having; and

Whereas, the said Joe Bowers and his inimitable ballad are the common property of the great State of Missouri and her people, every county proudly claiming him as her son, and every lover gladly adopting his song as his own, and all hearts beating in unison with the poet and the poem; and

Whereas the said Joe Bowers, whether a real person or merely an imaginary hero, is a true type of that rugged but tender and sterling manhood which characterized one of the most important epochs in our nation's history, during which we achieved the conquest

of the aboriginal tribes and of Mexico, adding half a continent to our national domain; also, the conquest of the forest and the mine, adding untold millions to our nation's wealth, and laying the foundation for our present civilization, which is the pride and glory of all Americans, and challenges the admiration of all enlightened people; and

Whereas, the state capitol grounds at the city of Jefferson have been laid out more than sixty years, and millions of dollars have been expended to erect buildings thereon and to improve and beautify said grounds, yet they do not contain one vestage (sic) of statuary commemorative of the deeds of our heroes or illustrative of the spirit and genius of our times; therefore, etc."

number of the Ontario reports. The head note states that the damages were reduced from $3,897.62 to $500. According to the statement of the case, Mr. Cartwright assessed the damages of the plaintiffs at $3,897.62. The amount allowed for past damages was $1,551.62, and for future damages $2,346.

"The past damages were made up of the rent and taxes in arrear, and the future damages by capitalizing all the accruing instalments of rent down to the expiration of the lease, the future insurance premiums to the same date, and $400 for damages for past breaches of the covenant to repair, and the $2,346 represented the value at the date of the report of those sums so capitalized."

The learned Chief Justice in his report spoke of "the damages," and concluded, "In my opinion the report should be varied by reducing the damages to $500."

This, taken with the head note, would intimate that although according to the statement the amount allowed for past damages was $1,551.62, and the past damages were made up of the rent and taxes in arrear, the plaintiffs only recovered $500. This result seems a strange one.

It might be interesting to inquire how the sum of $400 allowed by the referee for damages for past breaches was capitalized so as to make up part of the sum allowed for future damages, this being the operation which the statement alleges to have been performed.

Yours truly,

T. H. LUSCOMBE.

London, Canada.

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CANADIAN LAW TIMES.

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REVIVAL BY CODICIL.

"NO will or codicil, or any part thereof which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." R. S. O. 1897, c. 128, s. 24.

This provision of our Wills Act, taken from the Imperial Statute, 1 Vict. c. 26, s. 22, has given rise to some uncertainty as to the requirements of a codicil designed to revive, or relied upon as having the effect of reviving, a revoked will. A decided difference of opinion on this subject appears to exist between the Supreme Court of Canada and the English Courts (*a*).

In order to clear the ground, attention should be directed to the distinction between "republication" (*b*) and "revival." When wills spoke from the date of execution republication was often a question of much importance. It is with revival alone that we are dealing. Moreover, the scope of this article will be confined to cases where the revocation of the will or codicil alleged to be revived has been effected by a revoking testamentary instrument, unaccompanied by physical destruction.

(*a*) Compare Macdonell v. Purcell, 23 S. C. R. 101, with In re Chilcott, (1897) P. D. 232, In re Reynolds, 3 P. & D. 35, McLeod v. McNab, (1891) A. C. 471, In re Van Cutsem, 63 L. T. R. 252.

(*b*) Holmes v. Murray, 13 Ont. R. 754.

Where a testamentary paper has been physically destroyed animo revocandi it is, of course, impossible that it should be re-executed, and it is also incapable of revival by codicil, however clear and distinct may be the intention to revive shown by the codicil (*c*). When, therefore, does a codicil to a revoked will, still having physical existence, operate to revive such revoked will? Assuming that a codicil may, by referring in adequate terms to a revoked will, if still existing, revive that will, what are adequate terms? What terms will suffice to show the requisite intention to revive?

The state of the pre-existing law upon this point is thus succinctly, and no doubt very accurately stated by Lord Penzance in In re Steele (*d*): "The theory of the law is and always has been that a codicil forms part of a will, and consequently, that to make a codicil to your will is first to affirm the existence of that will, and, secondly, to republish it or reaffirm its validity. It was therefore, before the Act, an inference which the law drew from the making of a codicil that the testator intended to reaffirm his will, and if the will had been revoked by reaffirming to revive it. In brief, it would not be wrong to say that all codicils to wills were held before the Act passed to revive the wills to which they were respectively codicils, if such wills had been previously revoked. As soon, therefore, as it could be ascertained that the codicil in question was a codicil to a particular revoked will, that will was revived." Many authorities might be cited to show the correctness of this statement of the law prior to the Victorian Wills Act (*e*).

Whether this statute materially altered the law, and if so to what extent, we must now enquire. That there has been some alteration effected is beyond question.

(*c*) Hale v. Tokelove, 2 Robt. 318; Rogers v. Goodenough, 2 Sw. & Tr. 342; Newton v. Newton, 5 L. J. (N. S.) 218.

(*d*) L. R. 1 P. & D. at pp. 577-8.

(*e*) Walpole v. Cholmondely, 3 Ves. 402; 7 T. R. 138; Re Chapman, 8 Jur. 902; Crosbie v. Macdoual, 4 Ves. 610; Neate v. Pickard, 2 N. C. 406.

Lord Hannen, in the Privy Council in 1891, said: "The intention must be found in the instrument itself. The recent decisions have established that a mere reference to the document intended to be dealt with, whether will or codicil, by its date, is not sufficient in itself (to effect its revival). The date is an important element, but is not to be taken by itself" (*f*).

Sir James Wilde (Lord Penzance) says, with equal distinctness, that the statute effects a material change, and that a codicil to a revoked will, no longer, merely by force of being a codicil to such a will, revives it. "The express words of the section meant (not) to leave the matter in the same state in which it would have stood if they had never been introduced" (*g*). Mr. Justice Sedgewick says, "It has been decided over and over again that a reference in a codicil to a revoked will by its date only, is not in itself a sufficient indication of an intention to revive that will" (*h*). Formerly the mere identification by the codicil of the revoked instrument was adequate; this no longer suffices, notwithstanding two cases decided after the Victorian Wills Act (*i*), apparently holding such a reference sufficient. There must be in the codicil some "other expressions conveying with reasonable certainty the intention" to revive (*j*). What will be deemed adequate expressions?

Before dealing with the authorities it may not be amiss to consider the language of the section itself. The old law required a codicil to an instrument thereby sufficiently identified. A codicil giving, however accurately, the date of a revoked will, and not containing any other evidence indicating the testator's intention to deal with that particular will, has been held to be now clearly insufficient (*k*), no doubt for the reason, though

(*f*) McLeod v. McNab, (1891) A. C. at p. 474; *Sed vide* In re Reynolds, L. R. 3 P. & D. 35.

(*g*) In re Steele, 1 P. & D. at p. 578.

(*h*) Macdonell v. Purcell, 23 S. C. R. at p. 120.

(*i*) Payne v. Trappes, 1 Robt. 583; Re Chapman, 1 Robt. 1. See also In re Reynolds, 3 P. & D. 35.

(*j*) In re Steele, 1 P. & D. at p. 578.

(*k*) McLeod v. McNab, (1891) A. C. at p. 474.

not explicitly stated, that the date is to be taken merely as the identification of the instrument to be affected by the codicil—something necessary to constitute it a codicil (for a codicil is not an independent testamentary document, but a document appendant to the will to which it relates, and of which it becomes in construction of law a part (*l*))—something, therefore, required by the old law in the absence of other identification, such as "my will drawn by A. B.," or "my will now deposited in the vault of C. D.," or my will "written above"(*m*); phrases, each of which, it is suggested, would in a proper case meet the requirements of identification. The statute requires more than a mere codicil. It requires a codicil duly executed "and showing an intention to revive." How much additional evidence of intention to revive must now be found in the codicil? Upon the English authorities apparently but little, in the absence of any ambiguity in the identification; upon the authority of our Canadian Supreme Court, terms, little if aught short of express words of revival would seem necessary, words importing upon their face the testator's knowledge that he was dealing with a revoked instrument. This fact the English cases certainly treat as presumably present to the mind of a competent testator, almost an essential to testamentary capacity, the idea of mistake being excluded. It is a known fact, in the light of which, as a pertinent surrounding circumstance (*k*), the true sense of the testator's words must be ascertained. It would seem that a failure upon the part of some learned Judges to attach to this very pertinent circumstance its due weight, a disregard of its significance, is the only explanation by which we can account for certain judgments, holding (erroneously, it is respectfully submitted,) in cases free from all ambiguity in the matter of the identification by the codicils of the revoked instruments, that such codicils, though containing expressions which, read in its light, would certainly seem

(*l*) Williams on Executors, 7th ed., vol. 1, at p. 211.
(*m*) Re Snowdon, 75 L. T. 279.

to convey with reasonable certainty the existence of an intention to revive, do not meet the requirements of the statute. The Legislature, no doubt advisedly, uses the word "showing": it does not say "expressing." These two words are scarcely synonymous. These appear to be the more striking features of the statutory provision; the authorities must be looked to for further light upon its purport.

We may commence with the case which is relied upon to sustain the judgments of the majority of the Judges of our Canadian Supreme Court in the Purcell case, and which is the first English case in which the meaning of the words "and showing an intention to revive" appears to have been carefully considered. In In re Steele (*n*) Sir James Wilde, having then before him three cases in which the question of revival by codicil arose, takes occasion in disposing of them to preface his judgments by an exposition of the law on the subject. After stating the pre-existing law in the passage above quoted, he proceeds in these terms to define the additional requirements imposed by the statute: "The Legislature meant that the intention of which it speaks should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question" (*o*). This passage has received the approval of the highest authority known to colonial Courts (*p*), and must, therefore, be taken to be an accurate statement of the effect of the statute. It would seem clear from this passage that this learned Judge did not consider the use in the codicil of "express words referring to a will as revoked and importing an intention to revive" the only adequate means of "showing

(*n*) 1 P. & D. 575.
(*o*) 1 P. & D. at p. 578.
(*p*) McLeod v. McNab, (1891) A. C. at. pp. 474-5.

an intention to revive" by codicil. It is not, however, upon this passage that the Canadian Judges (*q*), who held the codicil in the Purcell case inadequate to revive a revoked will rely, but rather upon certain other language used by the learned Judge which was purely obiter, and which, from its surroundings, and occurring as it does in his prefatory remarks, and after he had thus clearly laid down his view of the purport of the statute, was obviously not intended to narrow the meaning of the passage just quoted.

This passage reads: "Some general views, however, present themselves—some general probabilities of intention attend all such cases as those now under judgment. It may, in the outset, I think, be doubted whether any testator who bore in mind that he had revoked his will, and substituted another for it, ever really sat down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by simply making a codicil referring by date to his first will without more. Would any lawyer advise such a course, or would any unskilled testator imagine he could achieve the end by such a method? The leading idea of revoking the one and reviving the other in its place would surely find expression by some form of words in a paper designed mainly for that object" (*r*). This language has never, except in the Purcell case, so far as the writer is aware, been quoted as an accurate statement of the effect of the statute. It does not in itself purport to be such, but rather an expression of "some general views." Its accuracy is questioned by Mr. Jarman in his well-known work on Wills (*rr*).

In considering the decisions in the three cases dealt with by Sir James Wilde in order to appreciate their true purview, a short statement of the facts of each case will be necessary, since the material facts in each vary slightly from those in each of the others, and, as

(*q*) 23 S. C. R. at pp. 115, 130; 20 App. R. at pp. 544-5.
(*r*) 1 P. & D. at p. 579.
(*rr*) Jarman on Wills, 5th ed., vol. 1, at p. 191, note (*i*).

already stated, the learned Judge prefaces his actual judgments in these cases by a general exposition of the law. So far as applicable to cases presenting similar states of facts, the decisions are of course binding, but no further. The respective judgments in these cases state the facts as follows:

In the Steele case (*s*): "The testator made a will on the 16th January, 1866. On the 25th October, 1866, he made a fresh will revoking the former. On the 12th January, 1868, he made a codicil which was declared to be a codicil to his last will and testament, which bears date the 16th day of January last past, i.e., January, 1867. At the conclusion of the codicil he confirms his said last will. Here is a latent ambiguity"—in fact a double ambiguity. The only indication on the face of the codicil of an intention to deal with the will of 1866 was a reference to a legacy of £100 to a nephew, which in the later will was reduced to £50. This the learned Judge deemed insufficient to satisfactorily evidence an intention to revive in view of the ambiguity created by the use twice of the word "last" and an erroneous date, which in a man over 80 years old he thought showed the memory to be deficient. Compare with In re Van Cutsem (*ss*).

In the May case (*t*): "The testator made a will on the 11th of January, 1860. On the 18th of August, 1860 . . . he made a fresh will, and in terms revoked his former one. In the month of September of the same year he took the trouble to cancel his first will by tearing off the signature. On the 3rd of July, 1861, he made a codicil, which he described as 'a codicil to the last will and testament of me, John May, of, etc., and which bears date the 11th day of January, 1860.'" The Court finds in the surrounding circumstances no motive for revival.

In the Wilson case (*u*): "The testator made his will on the 24th of September, 1858. On the 16th of July,

(*s*) 1 P. & D. at p. 580.
(*ss*) 63 L. T. 252.
(*t*) 1 P. & D. 581.
(*u*) *Ibid.* p. 582.

1861, he made a fresh will disposing of the whole of his property. The first will was found after his death with the signature torn off, and had been used by him as a draft for the second will. On the 20th of December, 1864, he made a codicil, which he declares to be a codicil to 'his last will and testament dated the 24th September, 1858.' Notwithstanding this perfectly distinct reference to the date of his earlier will, it is plain to demonstration from the contents of the codicil itself, that he was really referring to the will of 1861."

In each of these three cases there was found upon the face of the codicil an ambiguity. The last will is spoken of; the date given is that of an earlier will, and Sir James Wilde says, "In the vast majority of cases when a man declares his intention that a particular paper varying his previous dispositions shall be taken as a codicil 'to his last will and testament' he means that which really is his last will and testament" (*v*).

In none of these cases, except in the Steele case (*w*), was there anything other than the reference to date, to indicate an intention to deal with the revoked will, and the Court held in each instance that the codicil did not show the requisite intention to revive. The testators did not use express words importing such an intention, and the Court found in the codicils neither dispositions only consistent with such an intention, nor other expressions with reasonable certainty conveying it. These decisions of Sir James Wilde are binding authorities only in cases where the reference in the codicil to the prior testamentary paper is ambiguous.

The facts in the Purcell case, known in the Ontario Courts sub nom. Purcell v. Bergin (*x*), and in the Supreme Court of Canada sub nom. Macdonell v. Purcell (*y*), are fully stated in the reports of the case in the Court of Appeal (*x*).

(*v*) *Ibid.* p. 579; See In re Edge, 9 L. R. Ir. 516.
(*w*) 1 P. & D. at p. 581.
(*x*) 20 App. R. 535.
(*y*) 23 S. C. R. 101.

The more material facts are as follows:

On May 14th, 1890, Patrick Purcell had a will drawn by Mr. O'Gara, whereby he disposed of all his estate, giving certain legacies to members of his family, and distributing the residue, about four-fifths of the whole, in charitable bequests. Of this will he appointed Leclair, McDonell and Stuart, executors, and to them he devised his entire estate upon trust to carry out the provisions of the will. On January 11th, 1891, he had Mr. Maclennan, of Cornwall, bring to him the O'Gara will, which he had deposited in the Surrogate Court for custody, and Mr. Maclennan having expressed the opinion that the charitable bequests of the O'Gara will were invalid, a new will was drawn and executed, whereby the legacies to relatives were materially reduced, comparatively small sums of money were bequeathed out of the pure personal estate to the charities, and the residue, about nine-tenths of the estate, was left undisposed of (*z*). By this will the testator expressly revoked the former will, and appointed as his executors Messrs. Leclair, McDonell and Maclennan. This new will was then taken and deposited in the Surrogate Court for custody. Next day the testator saw his medical adviser, and handing him the will of May 14th, 1890, asked him to obtain the opinion of his brother, Mr. John Bergin, a solicitor, as to the validity of the charitable bequests, saying nothing of what had taken place the previous day. By Mr. Bergin's advice this will was submitted to Mr. S. H. Blake, Q.C., who, hearing from Dr. Bergin that Purcell's health was very precarious, and having regard to the statutory provisions affecting most of the charities concerned, requiring devises in their favour to be made at least six months prior to the testator's death, advised that the will of May 14th, 1890, should be "kept alive." Neither Mr. Blake nor the Bergins ever knew of the revocatory will of 1891. Dr. Bergin returned the will of May 14th, 1890, to the testator with Mr. Blake's opinion, and Purcell, not desiring to continue Stuart in

(*z*) 23 S. C. R. at p. 134.

his executorship, instructed Dr. Bergin to ask his brother to act in Stuart's stead, and, if he were willing, to have him prepare a codicil for that purpose. A codicil was accordingly prepared by Mr. John Bergin in the following words:

"I will and devise that the following be taken as a codicil to my will of the 14th day of May, 1890, A.D.

I hereby revoke the appointment of Jas. A. Stuart, my late bookkeeper, to be one of the executors of this my will, and in his place and stead I appoint John Bergin, of the town of Cornwall, barrister-at-law, with all the powers and duties heretofore conferred upon the said Jas. A. Stuart, as in my said will declared.

In witness whereof I have hereunto set my hand this 16th day of March, 1891, A.D.

(Signed) P. Purcell.

Signed, sealed and published and delivered by Patrick Purcell as a codicil to his last will and testament (sic), who, in his presence at his request, and in the presence of each other have hereunto affixed our names as witnesses.

(Signed) George Milden.

(Signed) R. Flanagan."

After due execution the codicil was handed by the testator to Dr. Bergin, with instructions to take it to Mr. John Bergin, to have it attached to the will of May, 1890, then in Mr. Bergin's possession, and this was done. The due execution of all these instruments was fully established, and the testamentary capacity of the deceased was not disputed. Mr. Justice Robertson, who tried the case, held that the codicil revived the will. The Ontario Court of Appeal upheld this decision, Hagarty, C.J.O., dissenting, but on appeal to the Supreme Court of Canada, that Court (Fournier, Taschereau, Gwynne and Sedgewick, JJ., King., J., dissenting), reversed this decision, holding the codicil wholly ineffectual, and the will of 1891 alone entitled to probate. It is to be noted that of the ten Judges who heard this case in the several Courts, five (Justices King, Burton, Osler,

Maclennan and Robertson) were of opinion that the codicil did revive the O'Gara will, and five (Hagarty, C.J.O., and Justices Fournier, Taschereau, Gwynne and Sedgewick) held the contrary opinion.

The judgments of the latter were based almost entirely upon the "general views" enunciated by Lord Penzance in In re Steele (*a*), and, to some degree perhaps, countenanced by Marsh v. Marsh (*b*), and In re Turner (*c*). Hagarty, C.J.O., refers to In re Steele as fully stating the law, and quoting (*d*) the passage of Sir J. P. Wilde's judgment found at page 579 of the report of that case, remarks that the codicil contains no word confirming or ratifying the will (*e*); and although he considers that it is wholly impossible to believe that Purcell, when he signed the codicil, was not aware that he had executed the Maclennan will (*f*), yet finds it incredible that if the testator had the idea of reviving the revoked O'Gara will, some customary words indicative of such intention would not have been used (*g*). Fournier, J. (*h*), gives no reasons for judgment. Taschereau, J. (*i*), adopts the judgment of Hagarty, C.J.O. Gwynne, J., finds it inconceivable that the testator could have contemplated by the codicil and the language therein that he was expressing an intention to revoke the will of January, 1891, and to revive that of May, 1890—utterly inconceivable that no words expressing that intention should have been inserted (*j*), and because Mr. Bergin, who did not know of its revocation, in drawing the codicil, refers to the O'Gara will in terms in accord with his belief that this will was then valid, the learned Judge apparently credits the testator in adopting these words

(*a*) 1 P. & D. 575, at p. 579.
(*b*) 1 Sw. & Tr. 533.
(*c*) 64 L. T. 805.
(*d*) 20 App. R. at pp. 544-5.
(*e*) *Ibid.* p. 544.
(*f*) *Ibid.* p. 545.
(*g*) *Ibid.* p. 546.
(*h*) 23 S. C. R. at p. 105.
(*i*) *Ibid.*
(*j*) *Ibid.* at p. 116.

with the same intent only as the draftsman (*k*). He does not find in the provisions of the codicil removing Stuart as executor and replacing him by Bergin (although Stuart had already been removed and replaced under the will of 1891 by Maclennan), and in the words conferring upon Bergin the same powers and duties as by the O'Gara will conferred on Stuart (powers and duties quite different from those of the executors under the Maclennan will), any indication of an intention to revive the O'Gara will (*l*).

Sedgewick, J., conceding that it is quite clear that the testator intended to make a codicil to the revoked will, thinks "that in the Courts below the distinction has been lost sight of between an intention to make a codicil to a revoked will and an intention to revive a revoked will" (*m*). His Lordship does not suggest any satisfactory purpose for which a competent testator would deliberately make a codicil to a revoked will, unless he intended that it should be revived. "The expression of the reviving intention" (*n*), his Lordship thinks indispensable, and quoting (*o*) the passage from In re Steele, found at page 579 of the report of that case, he adds, "And so I say that if Purcell wanted to revoke the second and revive the first will he would have said so." His Lordship thinks the provision of the codicil removing Stuart, the executor whose appointment the Maclennan will had already revoked, and appointing Bergin in his stead, "a matter of little account" (*p*), though Lord Hannen, in delivering the judgment of the Privy Council in McLeod v. McNab (*q*), said of a similar dealing by codicil with an executor whose appointment had been already cancelled, that it "leads inevitably to the conclusion" of revival, and is an expression conveying with reasonable certainty that intention.

(*k*) *Ibid.* pp. 116-7.
(*l*) *Ibid.* p. 118.
(*m*) *Ibid.* p. 121.
(*n*) *Ibid.* p. 122.
(*o*) *Ibid.* p. 130.
(*p*) *Ibid.* p. 122.
(*q*) (1891) A. C. at p. 475.

Mr. Justice King (dissenting in the Supreme Court) holds that express words of revival are not needed (*r*), and that it suffices if the codicil otherwise shows the intention to revive. He deems the repetition of the words "this my will" and the removal of Stuart, an executor already removed, and the substitution of Bergin with the same powers and duties as by the O'Gara will were conferred on Stuart, expressions conveying with reasonable certainty the intention to revive.

In the surrounding circumstances (evidence of which all the Judges agree was properly received to enable the Court to understand the position of the testator (*s*), and the better enable it to read the true sense of his words), he finds a sufficient motive for the revival of the O'Gara will, and he adds that the testator must "be credited with some sense and some honesty" (*t*). He cannot account for Purcell's conduct by a mere assumption that in making the codicil his sole purpose was to deceive, and he can find no other purpose than that of reviving the O'Gara will in an act which would otherwise be meaningless.

Burton, J.A., advances very similar views, thinking that even if the mere appointment of Bergin in place of Stuart might be insufficient, the additional words conferring upon Bergin "all the powers and duties heretofore conferred upon James A. Stuart as in my said will declared," clearly show the requisite intention (*u*). Maclennan, J.A., dwells upon the same facts, and finds that they show "irresistibly" an intention to revive (*v*). Osler, J.A., concurs with Maclennan, J.A. (*w*), and the judgment of Robertson, J., not reported, was based on similar grounds.

(*r*) 23 S. C. R. at pp. 131-2. Compare with In re Edge, 9 L. R. Ir. 516; and In re Chilcott, (1897) P. D. 252.

(*s*) McLeod v. McNab, (1891) A. C. at p. 474; Methuen v. Methuen, 2 Phil. 416; In re Steele, 1 P. & D. at p. 576; Greenough v. Martin, 2 Add. at p. 243; Macdonell v. Purcell, 23 S. C. R. at p. 105, per Gwynne, J.; Jenner v. Ffinch, 5 P. D. 106. See also Chichester v. Quatrefegas, (1895) P. D. at p. 188.

(*t*) 23 S. C. R. at p. 134.

(*u*) 20 App. R. at pp. 552-3.

(*v*) *Ibid.* 555-6.

(*w*) *Ibid.* p. 561.

Steps were taken to carry this case to the Privy Council, but before the necessary petition for leave to appeal could be presented a settlement was arrived at.

Attention should be directed to the fact that while in In re Steele the use of the word "last" in the respective codicils created an ambiguity, there was no such ambiguity in Purcell's codicil. That codicil refers to the O'Gara will correctly by its date; and it is only in the attestation clause, which forms no part of the codicil, being the language not of the testator but of the witnesses (*x*), that the word "last" occurs.

Gwynne, J., Sedgewick, J., and Hagarty, C.J.O., failed to discover in the surrounding circumstances in the Purcell case any sufficient indication of a reason or motive on the part of the testator for the revival, notwithstanding the uncontroverted evidence that Mr. Blake's advice to "keep alive" the O'Gara will was communicated to Purcell, who, two of these learned Judges state (*y*), and the other does not question (*z*), must then have recollected the revocation of this will—a fact which it is submitted must always be presumed, once testamentary capacity is admitted or established. Moreover, upon this evidence it appears that immediately upon Mr. Blake's advice being so communicated to him (*a*), the testator, knowing of the revocation not only of the O'Gara will, but also of Stuart's appointment as executor, and the very different provisions of the Maclennan will, set about arranging for a codicil to the O'Gara will, removing Stuart as an executor of that will, and substituting for him Bergin, with all the powers and duties conferred on Stuart by the O'Gara will, and contained in that will alone. Upon critical examination it must, we believe, be evident that the keynote to the judgments of the learned Judges, who held the codicil ineffectual to revive the O'Gara will, was the

(*x*) In re Atkinson, 8 P. D. 165.

(*y*) Per Sedgewick, J., 23 S. C. R. at p. 125; per Hagarty, C.J.O., 20 App. R. at p. 545. See also Taschereau, J., 23 S. C. R. at p. 105.

(*z*) Gwynne, J., 23 S. C. R. p. 115, *et seq.*

(*a*) 23 S. C. R. pp. 128, 135.

absence from that codicil of express words of revival of the earlier, or of express words of revocation of the later will (clearly unnecessary) (*b*), and their failure to attach sufficient importance to the fact that the testator knew, though the draftsman did not, when executing the codicil, that he was dealing with a revoked will, a fact all-important when the sense of the words used by the testator is sought. To refuse probate to the codicil, and declare it, although an instrument duly executed by a man of admitted testamentary capacity, wholly void, infringed that most wholesome maxim *ut res magis valeat quam pereat*, and, it is respectfully submitted, placed the Court in a position untenable upon the English authorities.

The Court found itself obliged to treat this codicil as wholly ineffectual, because if operative at all its operation could only have been upon the provisions of the revoked will. Could this case be more strongly put for the contention that this codicil contained dispositions "inconsistent with any intention" other than that of reviving the revoked will?

FRANK A. ANGLIN.

(*b*) R. S. O. 1897, cap. 128, sec. 22; McLeod v. McNab, (1891) A. C. at pp. 475-6; Chichester v. Quatrefegas, (1895) P. D. at p. 186; Jenner v. Finch, 5 P. D. at p. 111; Dempsey v. Lawson, 2 P. D. at p. 98; Newton v. Newton, 12 Irish Chy. 127; Hale v. Tokelove, 2 Robt. 310. Notwithstanding the dictum in Marsh v. Marsh, 1 Sw. & Tr. at p. 534.

(To be concluded.)

EDITORIAL REVIEW.

New Trials in Criminal Cases.

The granting of a new trial in the case of Regina v. Sternaman, by the Minister of Justice, is, we believe, the first instance of the exercise of this power under the Code since it became law; and naturally is the first occasion in which attention has been directed to the very wide scope of the section of the Code which gives the power. The circumstances of the application in that case were unique; but it may safely be predicated that it will form a precedent, which, perhaps, will not technically bind either the same or any future Minister, but which will invariably be cited and vigorously pressed on any future application.

The clause which gives power to grant a new trial provides the following conditions:—

1. The application is to be for the mercy of the Crown.

2. The Minister of Justice must "entertain a doubt whether such person ought to have been convicted."

3. He may direct a new trial, "instead of advising Her Majesty to remit or commute the sentence."

4. He may make "such inquiry as he thinks proper."

The enactment is a very remarkable one, in this sense, that the Minister has no original power to entertain an application for a new trial. Any appeal or application for a new trial in substance and in form must be to the Court of Appeal. The only application which the minister can entertain is one for the mercy of the Crown.

Such an application would, but for the power to grant a new trial, be an unequivocal admission of guilt, for the mercy of the Crown could not be extended to any one but a convict.

Before this enactment, cases undoubtedly arose in which convictions had wrongly been made. But there being no method by which they could be reversed or quashed, the only recourse was to ask the mercy of the Crown, which would, of course, be extended. The pardon purged the conviction, but the unfortunate defendant had to go through life as a pardoned criminal. The section in question enables the Minister, instead of pursuing this course, to direct a new trial.

If this is the key to the section, it affords a very narrow ground to stand on. But the section is too wide in its scope to argue for this narrow interpretation. It especially allows the Minister to make any inquiry he thinks proper, which necessarily does not confine him to the single case of wrongful conviction. He need only entertain a doubt, according to the previous part of the section; he need not be convinced of innocence. To give it the narrow construction we have just suggested would be to permit his granting a new trial only in cases where but for the section he would have felt it his duty to advise a pardon. The new trial is to be the substitute for either a remission of the sentence, which would occur only when the Minister was convinced of the innocence of the prisoner, or the commutation, in which case he would not be convinced of the guilt, but at the same time would not be convinced of the innocence. The enactment, then, seems to give the very widest possible scope to the powers of the Minister, and to permit him to direct a new trial whenever he entertains a doubt as to whether the prisoner ought to have been convicted.

The next consideration is as to what material the Minister ought to consult, upon which to form his opinion, or rest his doubt. He may make any inquiry he thinks proper. Does this entitle him to travel outside

the record, and consider evidence which he has not before him on the record? Plainly so, for the most indisputable evidence of witnesses to the innocence of the prisoner would otherwise be excluded. A mistrial, or rather a miscarriage of justice, is most likely to occur where the necessary evidence as to the actual truth has not been obtained. And the subsequent production of it would necessarily form the most urgent ground for, granting a new trial.

In dealing either with new evidence or the evidence taken at the trial, however, what is the weight to be accorded to it? Is the Minister to be at liberty to depart entirely from the ordinary rules and practice upon which new trials are granted? First, as to weight of evidence. By section 747, a new trial may be applied for to the Court of Appeal on the ground that the verdict was against the weight of evidence. No doubt the ordinary rules of practice would govern the Court in granting or refusing a new trial in such a case. Every practitioner knows that it is almost impossible to set aside a verdict in civil cases on the weight of evidence; and in criminal cases, if this rule were followed, it would be practically impossible to get a new trial, because the jury are always instructed not to convict unless they are positive of the guilt on the evidence adduced. The practice as to this is so well known that we must apologize for referring to it. How often the Court has said, "The jury weighed the evidence and could not have believe those who were opposed to the party in whose favour the verdict was found. Can we say they were wrong? Have we the same facilities for estimating the value of the statement made?"

This being clearly the rule in civil cases, ought the Minister of Justice, in criminal cases, to follow this rule or not? It is not one laid down for the convenience of Courts; it is because the Courts feel themselves unable to judge of the weight of the evidence as well as those persons who heard it in open Court. The jury may have weighed and rejected as unreliable the very evidence

which looks most convincing on paper. It is respectfully submitted that in considering the weight of evidence the practice of the Court ought strictly to be followed in the Department of Justice. There will almost always be evidence on both sides. The doubt as to the truth is resolved by the verdict. If the verdict is not to be the final test, there will be a doubt in every case. And in every case, therefore, there being a doubt, there should be a new trial. It seems, therefore, reasonable that a very strict rule ought to be laid down as to granting new trials on weight of evidence. We have left untouched the question whether, as an appeal is expressly given to the Court of Appeal on weight of evidence, it was intended that a similar appeal should be made to the Minister of Justice under cover of an application for the mercy of the Crown. It could not be tested probably as there is no way of reviewing his decision.

Secondly, as to new evidence. The rule here in civil Courts is also well understood. It is sometimes attempted to get a new trial on the discovery of new witnesses, but such attempts very properly fail. It is the discovery of new evidence which rules. And discovery implies not only that no evidence of the kind discovered was given at the trial, but that the person seeking to introduce the new evidence had not the opportunity to give it at the trial. If it was in his power to have got it by due diligence, he cannot plead his want of diligence, and base his motion for a new trial on his own want of diligence. And when a party does not ask a question of a witness which he might have asked when the witness was in the box, he is entitled in the civil Courts to no consideration at all. In the first place, when upon an issue in the case, witnesses have been called, no new trial would ever be granted on the ground that other witnesses have since been discovered who would have confirmed and strengthened the side which was unsuccessful. In the second place, when it is alleged that no new witnesses have been discovered, but that the witnesses examined have not been fully examined, the case

is made proportionately weaker. If a party moved the Court for a second trial on that ground, he would hardly have the opportunity to state his ground before his motion would be dismissed. To permit, for a moment, any such ground to be discussed would be to throw open the door to interminable litigation. No action could ever be finally disposed of if it were to be sent back for a new trial on the ground that a witness did not tell all he knew because he was not asked the necessary questions to bring out the sum of his information. It appears then that this phase of the question discloses the very weakest and most easily condemned ground in the civil Courts for moving for a new trial. Is it probable that the Legislature intended that to form a ground for an appeal to the Crown for a new trial? One would say not. It would offer a premium upon a weak defence and encourage the non-disclosure of all grounds of defence at the trial in order to obtain a new trial.

Notwithstanding the very clear and well-defined rules relating to the weighing of evidence, the admission of new evidence on a point discussed at the trial, and the great care to be exercised by the civil Courts in order to prevent a perversion of justice by careless or designedly loose methods of conducting proceedings, it does not follow that the Courts will rigidly apply the same rules to appeals in criminal cases. No doubt the principles of the rules should apply, tempered only with that moderation which is invariably practised where the life or liberty of a human being is at stake. And there seems to be no good reason why the same principles should not be similarly applied by the Minister of Justice. If they are not adhered to, we may expect the natural result, viz., that appeals to the Courts will be avoided, and appeals to the Crown, where judicial rules do not apply, will invariably be made. The criminal laws instead of being uniformly administered upon a system of judicial rules well understood, will then be administered upon the variable opinions of a succession of gentlemen, who, how-

ever able and learned, will never feel themselves bound to follow precedent or observe the rules of law and practice. A greater misfortune could not happen to a system of laws based on justice and humanity and administered with moderation.

CORRESPONDENCE.

Light in the Library.

To the Editor of THE CANADIAN LAW TIMES:

Dear Sir,—Could you find space in your columns for the enclosed lines regarding the light, or rather the want of it, in the Library at Osgoode Hall in the evening. The words are not conceived in any spirit of criticism. They are written by one, who, since it has been opened at night, has fully appreciated the value of the Library, and who has constantly taken advantage of it; but this very appreciation has enabled him to see more clearly the serious interference with its efficiency which ensues from the lack of light. Might I ask that this communication be treated more seriously than the form into which it has been thrown would seem to justify. An increase of light, even at increased expense, would be a very material benefit to the many who use the Library, and to the many more who probably would do so.

DARK SAYINGS IN LIGHTER VEIN.

I am reading to-night in a beautiful room,
Where silence is sternly enforced;
Where Industry's married to Law for her groom
And Frivolity's weeping divorced.

Yet one defect mars this inspiring sight—
If you only could see it, I mean—
For the struggle that Darkness is waging with Light,
Is all that distinctly is seen.

But peering again with a more prolonged look,
Thro' this light so religiously dim;
You discover each occupant reading a book,
And feel very sorry for him.

He is sitting so patiently there in the gloom,
Gazing hard at the book near his eyes;
And each line that he reads is but sealing his doom—
He will surely be blind ere he dies.

'Tis a privilege sure to prepare before bed,
For the work that the morrow will bring;
But to work in the dark is not good, it is said:
It seems hardly a sensible thing.

Tho' Justice, whom lawyers all worship, is blind;
Tho' her tenets we heartily prize,
One does not, by getting new light for his mind,
Like to forfeit the light of his eyes.

Yours, etc.,

SHIRLEY DENISON.

Toronto, 26th January, 1897.

CARLETON LAW ASSOCIATION, REPORT, 1897.

The members number fifty-eight, being an increase of five over last year. The annual fees paid amounted to $260. The stock taken by new members was $20; the grant from the Law Society of Upper Canada, $425; and from the Ontario Government, $52.63, and $3.96 interest, amounting in all to $761.59. The sum of $262.75 has been expended in the purchase of books, and after the other expenses of the Association have been paid a balance of $296.28 remains in the treasurer's hands. Forty-seven volumes have been added to the library during the year; the total number of books now being 1,575, the value of which is about $4,980, on which the insurance of $3,000 has been kept in force. The librarian reports that no books have been lost during the year.

During the year the inspector of legal offices examined the library and books of the Association, and while expressing himself satisfied therewith, he reports that the room in which the library is contained is most unsuitable, and recommends that it be restored to its former location in the Judge's Chambers.

The members of the Association met at the Court House on the 8th January, 1898, when an address was made on behalf of the Bar to the late President of the Association, now His Honour Judge MacTavish, upon the occasion of his appointment to the Bench of the County Court of the county of Carleton.

At a meeting of the Association held on the 4th January, 1898, it was resolved to present an address to His Honour Judge Ross on the occasion of his retirement from the Bench. This address was presented to-day.

15th January, 1897.

THE
CANADIAN LAW TIMES.

MARCH, 1898.

REVIVAL BY CODICIL.

(*Concluded.*)

THE Purcell case has been fully dealt with because it is the only Canadian authority upon the question, and because of the equal division of judicial opinion to which it gave rise. The English authorities now to be reviewed will, it is believed, be found to sustain the judgments of the five Judges who deemed Purcell's codicil effectual to revive his revoked will, rather than of the five who, thinking otherwise, held that codicil of no avail whatever. In re Turner (*c*), which was much relied upon to support the latter view, is, it is submitted, clearly distinguishable.

In re Chilcott (*d*):—The will of Elizabeth Chilcott, prepared by "A." and dated July 16th, 1889, disposed of all her property, and named M. and S. as executors. In 1892 she instructed "A." to prepare a codicil to this will, but did not execute it, though "A." thought she did. On May 14th, 1892, she had another solicitor prepare another will disposing of all her property, revoking the will of 1889, and naming the same executors. In 1893 she instructed "A." to prepare a codicil, and he, in ignorance of the will of 1892, drafted a codicil, the material parts of which are, "This is a second codicil to the will of Elizabeth Chilcott, dated July 16th, 1889.

(*c*) See *infra*, p. 53.
(*d*) (1897) P. D. 223.

. . . In all other respects I confirm my said will and the first codicil thereto."

On application by the executors for probate of the will of 1892 and codicil of 1893, In re Steele was cited. Gorell Barnes, J., after stating the facts, points out that the ground of the application is a mistake of the testatrix in referring to the will of 1889, and ignorance on the part of the solicitor of the existence of the will of 1892. He then adds, "The difficulty in the way of acceding to this application lies in the express language of the codicil. In distinct terms it refers to the will of 1889, and it expressly confirms that will. There is no doubt that in drawing the codicil of 1893, the solicitor meant to deal with the will of 1889. . . In my opinion the case comes within the authority of In the Goods of Stedham (*e*), and In the Goods of Dyke (*f*), where the point was very similar, and not within In re Steele (*g*). In his judgment in In the Goods of Stedham, Sir James Hannen says: 'The solicitor who was instructed to prepare this codicil, instead of making a codicil to the will of 1878, made a codicil to the will of the 21st of May, 1877, and I was asked to treat it as a mere mistake as to the date, and to allow probate of the codicil together with the last will of February, 1878. I am unable to do so, for this reason: that it was not a mere mistake as to the date of the will to which it was intended to append the codicil, but the mind of the solicitor, which must be treated as that of the testator, was actually applied to the provisions of the will of 1877." In the present case, there can be no doubt that the solicitor, who only knew of the existence of the first will, . . . applied his mind to the first will, and then drew the codicil of September 7th, 1893, which was duly executed. The result does not express, I am aware, the real intention of the testatrix, but I can only deal with the documents as they stand." He admits all three to pro-

(*e*) 6 P. D. 205.
(*f*) 6 P. D. 207.
(*g*) 1 P. & D. 575.

bate, leaving their meaning to be determined by a Court of construction.

It is interesting to compare this language with that of Gwynne, J. (*h*), and Hagarty, C.J.O. (*i*), in the Purcell case, and with In re Turner (*j*). In this Chilcott case (*d*), the intention to revive is held to be sufficiently shown by the reference to the date of the revoked will and the use of the word "confirm." There was here no such ambiguity as is so often created by the use of the word "last." The language of this codicil certainly did not show an intention to revive at all as strongly as did that of the codicil in the Purcell case.

In re Snowdon (*k*). The testator made a will in August, 1884, naming A. and B. executors; another will in November, 1884, revoking the former, and naming A., B. and C. executors. In 1890 he handed his will of August to his solicitor, and had a codicil subjoined to it, revoking the appointment of A. and B. as executors, and appointing D. and E. This codicil referred to his will as "written above," and also thus, "which will with one codicil thereto is written on the six preceding sheets of paper." A further codicil, disposing of some china, was made in 1895, being written on the same sheet of paper. The solicitor gave evidence of mistake which was satisfactory to the Court. The codicils did not contain any reference to the terms of the will of August, or anything other than the references above stated, inconsistent with their applicability to the later will. The physical annexation being accounted for by the evidence of mistake, the codicils in their terms did no more than identify the revoked will, as "above written," etc., which was in effect tantamount only to identifying it by date. The decision holding the first will not revived, startling as it at first appears, is therefore consistent with the cases holding mere identification of the

(*h*) 23. S. C. R. at pp. 116-7-8.
(*i*) 20 App. R. pp. 544-5.
(*j*) 64 L. T. (N. S.) 805. Contrast In re Dyke, 6 P. D. 208.
(*k*) 75 L. T. 279.

revoked instrument by a codicil insufficient to effect its revival.

In re Gordon (*l*). This was a consent case, and is, therefore, no authority. The codicil referred to the earlier will by its date, but designated it "my last will." On consent, the later will and codicil were admitted to probate.

McLeod v. McNab (*m*). This case, somewhat similar to the Purcell case, came before the Privy Council in 1891. One Alexander McLeod made his will on the 17th day of July, 1880, containing a residuary bequest to Dalhousie College. There was a codicil, dated the 17th June, 1882, which contained a revocation of the bequest to Dalhousie College, and removed an executor of the will of 1880, one Thompson. On the 21st day of July, 1882, a second codicil, expressed to be a codicil to the will of 17th July, 1880, purported to confirm it in every particular, except as altered by such codicil. This codicil also purported to annul the appointment of Thompson as an executor.

The question for decision was, whether the residuary bequest contained in the original will of 1880 was revived by the second codicil. It was held to be revived.

This second codicil was executed by the testator for the sole purpose of making a change of executors. In it the testator treats Thompson as an executor, although his appointment had already been cancelled by the first codicil. This appears to their Lordships "to lead inevitably to the conclusion that when the testator in that part of the codicil of the 21st of July, 1882, is speaking of his will, he is referring only to the document of the 17th July, 1880; and that therefore, in the language of Sir James Wilde, in the case above referred to, their Lordships do find in the instrument under consideration expressions conveying to the mind of the Court, with reasonable certainty, the existence of the

(*l*) (1892) P. D. 228.
(*m*) (1891) A. C. 471.

intention in question, namely, to deal with the will of 1880, not in combination with, but as distinct from the codicil of the 17th of June, 1882" (*n*).

In this case Lord Hannen concludes his judgment with these words (*o*), "Their Lordships are of opinion that the word 'confirm' is an apt word, and expresses the meaning and has the operation of the word 'revive' which is used in the statute." With all deference to such a weighty authority, it is submitted that the word "confirm," *per se*, is by no means the equivalent of "revive." The latter implies a dealing with a revoked instrument; the former is an equivocal term equally apt in a case of mere republication of an existing valid will by a codicil. The word "confirm" only receives its significance as a word of revival, when taken in conjunction with the testator's knowledge that he is dealing with a revoked instrument, and its use in a codicil to a revoked will is, it is respectfully suggested, not at all so strongly indicative of an intention to revive as the other words so used, but found insufficient by the Supreme Court of Canada (*p*). However, we have the authority of the Privy Council that the greatest efficacy must be attributed to this word in such a codicil, though this is questioned by Mr. Jarman (*pp*), and it incontestably follows that the expression in the terms of such a codicil of the testator's knowledge that he is dealing with a revoked instrument is altogether supererogatory.

In re Turner (*q*). Jane Turner had solicitor A. prepare a will in April, 1881, and a codicil thereto in August, 1881. She had solicitor B. prepare another will in February, 1885, revoking all former wills, and a codicil thereto in December, 1885. Each solicitor kept the documents prepared by himself. The testatrix later sent her ser-

(*n*) *Ibid.* at p. 475.

(*o*) *Ibid.* at p. 476.

(*p*) *Supra*, p. 34.

(*pp*) Jarman on Wills, 5th ed., p. 191, note (*l*); and In re Steele, 1 P. & D. at pp. 579-580. See also Countess de Zichy Ferraris v. The Marquess of Hertford, 3 Curt. 468, at p. 514 *et seq.*

(*q*) 64 L. T. 805.

vant for those drawn by B., and read and returned them. She subsequently stated that the will and codicil drawn by A. were all right, and would remain. In 1889 she sent for A., who knew nothing of the work done by B., and remained ignorant of it throughout, and had him draw a codicil for her which read, "This is a second codicil to the *last* will of me, Jane Turner, etc., dated April, 1881 . . . I hereby ratify and confirm my said will and codicil." A confidential servant swore that she believed the testatrix had not made any mistake in referring in this codicil to the earlier will.

Jeune, J., in giving judgment holding the earlier will and codicil not revived, says: "I strongly suspect this testatrix did not intend to revive the first will, thinking it was in force; or possibly she may have forgotten all about the will and codicil of 1885. It is clear that the solicitors thought the will and codicil of 1881 were still in force at the time they drew the last codicil. They would not, therefore, by the words 'ratify and confirm' have intended to revive the first will and codicil . . . The probability is that the testatrix, in mistake of law, and the solicitor, in mistake of fact, thought that the first will and codicil were really in existence (as in fact they were), and of full force and effect (which they were not)" (*r*). Probate was ordered of the will and codicil of 1885, and the codicil of 1889. Maclennan, J.A. (*s*), says this case seems inconsistent with the other English authorities. The reasons for judgment are certainly singular. It must, however, not be overlooked that the codicil here was ambiguous; the word "last" being used, as in all the English cases where the codicil was held not to have revived the earlier revoked will (*ss*). The decision, therefore, really only amounts to this, that the parol evidence failed, having regard to this ambiguity, to satisfy the Judge, in the absence of any other indication thereof on the face of the codicil than was

(*r*) Compare with In re Chilcott, *supra*, p. 49, and cases *infra*.
(*s*) 20 App. R. at p. 557.
(*ss*) See In re Edge, 9 L. R. Ir. 516.

afforded by the reference to the date, that the codicil showed the requisite intention. Upon this frail authority, and the mere *dictum* found in In re Steele (both distinguishable cases), the learned Judges, Hagarty, Taschereau and Gwynne, largely base their judgments in the Purcell case (*t*).

In re Dennis (*u*) was a case where a testator executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874 and the will of 1875, died, and he made another codicil in 1891, disposing of the property which he had left to them, which he described as a codicil to his *last* will and testament, and which began in these words: "Whereas, my two sisters named in my codicil, dated May 12th, 1874, are both since dead," etc. Jeune, J., said: "I think it is quite clear that the codicil, so far from expressing an intention to revive the previous codicil, contains evidence that there was no intention to revive it." He, therefore, excluded it from probate.

In re Van Cutsem (*v*). In this case the testator, by will dated 5th November, 1873, disposed of all his property and appointed his wife guardian of his children. On November 14th, 1878, he in terms revoked this will, and devised all his property to his wife. On October 10th, 1882, he executed a codicil to his "*last* will," confirming it in all respects, and "particularly the appointment therein of my wife as guardian of my infant children." Sir James Hannen, holding the will of November 5th, 1873, revived, refers to the ambiguity created by the use of the word "last," and then dwells upon the reference to the appointment of the wife as guardian. "There is no such appointment in the revocatory instrument of 1878, and I therefore have no doubt that the testator intended by the codicil of 1882 to revive the earlier will

(*t*) 20 App. R. at p. 546; 23 S. C. R. pp. 105, 116.
(*u*) (1891) P. D. 327.
(*v*) 63 L. T. 252.

of 1873." The ground of this decision is noteworthy. The codicil did not give the date of the revoked will. The reference to the guardianship is alone held sufficient to show the intention to revive, notwithstanding the use of the word "last." Compare with In re Steele.

In re Smith, Bilke v. Roper (*w*), was a case of republication, but this language from the judgment seems applicable to cases of revival. The test should be, is there something in the codicil "from which the inference can be drawn that when executing it the testator considered the (revoked) will as his will."

In re Ince (*x*) is another case complicated by the use of the word "last," which throws little, if any, light on the subject.

In re Stedham (*y*). The deceased made two wills, dated, the one May 21st, 1877, the other February 13th, 1878. Each was made by the same solicitor, who kept both. On January 24th, 1880, this solicitor drew a codicil for the deceased, which by mistake commenced with the words, "This is a codicil to my will which bears date the 21st day of May, 1877." Probate was sought of the will of February, 1878. Sir James Hannen refused to treat the case as one of mistake, and held that the codicil brought the will of 1877 again into existence, and that all three documents must be admitted to probate. Their effect he leaves to be considered by a Court of Construction.

In re Dyke (*z*). The testator made a will dated October 29th, 1878, which he revoked by another will dated November 9th, 1878. The first will gave (inter alia) the interest of £300 to his daughter Elizabeth for life, and £100 to her absolutely; the later will gave (inter alia) after the death of his wife £400 for the children of his daughter Elizabeth. The first will was, about nine months before his death, given by the testator to one

(*w*) 45 Chy. Div. 632, at p. 639.
(*x*) 2 P. D. p. 111.
(*y*) In re Stedham, 6 P. D. 205.
(*z*) In re Dyke, 6 P. D. 207.

Owens for custody; the second remained with the solicitor. On June 9th, 1880, the testator sent for the first will and had a Mr. Cooke draw a codicil to it. This codicil referred to the first will by date, recited and revoked the legacies of £300 and £100 to Elizabeth and gave £100 in lieu thereof, and "in all other respects confirmed the said will." Sir James Hannen's judgment was: "Where a simple mistake has been made as to the date of an instrument, the mistake can be set right; but in a case like this where the mind of the draftsman, whether the testator himself, or some one employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that the instrument was referred to instead of another. It is plain that this was the actual instrument which the then draftsman had in his mind, and it is not possible to avoid the conclusion that the codicil which purports to be a codicil to the will of the 29th of October, 1878, and which, after making certain alterations, confirms that will in all respects, does revive that will. But has it by implication revoked the intermediate instrument of the 9th of November, 1878? It does not do so in terms, or except where it deals with the same subject-matter. The result, therefore, seems to be that in consequence of the unfortunate error which has been fallen into, I must grant probate of all three instruments, and leave it to a Court of Construction to interpret them together."

In re Reynolds (*a*). This testator executed a will in May, 1866, and another will revoking all prior wills in 1871. In 1872 he executed a paper headed: "This is a codicil to the will of R., dated May, 1866." In re May was cited. Sir James Hannen, in delivering judgment holding the will of 1866 thereby revived, says: "The codicil of 1872 is expressly stated to be a codicil to the will of May, 1866; and there is nothing to show that the testator did not mean what he said, namely: That it should be a codicil to that will. The result is that in

(*a*) 3 P. & D. 35.

effect he revived that will." In this case the only evidence upon the face of the codicil of an intention to revive the revoked will was that afforded by the reference to its date. This case is not referred to in the report of McLeod v. McNab before the Judicial Committee.

In re Anderson (*b*). The testator made a will in February, 1864, and another in June, 1864, revoking the former. He later made a codicil "to my *last* will dated February, 1864." The same solicitor acted throughout, and the evidence showed that his clerk had by mistake taken up the earlier will when the codicil was prepared. The codicil contained nothing but the date showing any intention to deal with the revoked will, and contained the word "last." Lord Penzance held the February will not revived.

An Irish case, In re Edge (*c*), is also instructive: The testator made a first will on March 13th, 1876; a second will revoking the former on April 29th, 1876, and this codicil on June 9th, 1880: "I make and publish this codicil to my will dated 13th March, 1876. I cancel the gift of £400 willed to my son W. J., having paid him that amount since I made my said will." No legacy appears by the report to have been given by the April will to W. J. This fact is not adverted to in the judgment, however, which holds the reference by date and the use of the words "my said will" to sufficiently show the required intention to revive the earlier will. In re Steele (*d*), In re Dyke (*e*), and In re Stedham (*f*), are referred to in this case.

Physical annexation of the codicil to a revoked will was in Marsh v. Marsh (*g*) held not to show an intention to revive within the meaning of the statute, inasmuch as any such inference from that fact would be drawn

(*b*) 39 L. J. p. 55.
(*c*) 9 L. R. Ir. 513.
(*d*) 1 P & D. 575.
(*e*) 6 P. & D. 207.
(*f*) *Ibid.* 205.
(*g*) 1 Sw. & Tr. 533.

from something not appearing upon the face of the codicil itself; but it is submitted that while in itself clearly insufficient, such annexation is nevertheless a pertinent circumstance which may aid the Court very materially in arriving at the true intent shown by the words used in the codicil (*h*). Especially is this the case where upon the face of the codicil there is uncertainty, by reason of the use of the word "last," or a date inaccurately given, which testamentary document is really referred to.

To what conclusion does the consideration of the foregoing cases direct us in seeking an answer to the question—what terms in a codicil purporting to be drawn to a revoked will, are adequate to effect the revival of such will? In the first place, cases where the identification of the revoked will is explicit and unambiguous are on an entirely different footing from cases where the reference to the testamentary document is ambiguous.

In the latter class of cases, especially when the will is in the codicil referred to by the word "last," it would appear that irresistible evidence upon the face of the latter instrument in the form of dispositions absolutely inconsistent with any other intention, or language almost equivalent to express words of revival is necessary. Compare In re Turner (*i*) and In re Steele, In re Wilson and In re May (*j*) with In re Van Cutsem (*k*). Where there is ambiguity in the identification by the codicil parol evidence of intention would seem admissible (*l*); and it has even been admitted to prove mistake where the codicil contained no other evidence of intention to revive than the mere identification of the revoked instrument (*m*). In cases of ambiguous reference the word "confirm," notwithstanding the authority of the Privy

(*h*) In re Terrible, 1 Sw. & Tr. 140; Sed vide In re Snowdon, 75 L. T. 279, *supra*, p. 51.

(*i*) 64 L. T. 805.

(*j*) 1 P. & D. pp. 580-582.

(*k*) 63 L. T. 252.

(*l*) Chichester v. Quatrefegas, (1895) P. D. p. 188.

(*m*) In re Snowdon, 75 L. T. 279.

Council (*n*), would, it is with deference submitted, be clearly inadequate as a word of revival, its efficacy as such being, as already pointed out, not inherent, but dependent on the assumed presence in the testator's mind of the fact that he was dealing with a revoked instrument. The ambiguity of reference makes this quite uncertain, and the necessary presumption cannot arise. Is it not, therefore, clear that this word "confirm" is not synonymous with and has not the inherent force and virtue of the word "revive"?

On the other hand, in those cases where the codicil refers in clear, distinct and unambiguous terms, by date or otherwise, to the revoked will, while such reference is probably not in itself sufficient (*o*), and some further evidence of the testator's intention upon the face of the codicil is necessary, any additional terms used by him, from which the inference can be drawn that when executing the codicil the testator dealt with the revoked instrument as his will, to become operative on his death, will suffice (*p*). These terms must, of course, be read as words deliberately used by a testator knowing he was dealing with a revoked will (*q*). And words which would not of their own inherent virtue be adequate—equivocal words—may be so, when read in the light of this most pertinent circumstance necessarily presumed (*r*). There being no ambiguity, parol evidence of intention is inadmissible to show mistake (*s*), although the Court can and should receive evidence of surrounding circumstances (*t*). Neither express words of revival nor words

(*n*) McLeod v. McNab, (1891) A. C. p. 476.

(*o*) McLeod v. McNab, (1891) A. C. 474; but see In re Reynolds, 3 P. & D. 35.

(*p*) In re Edge, 9 L. R. Ir. 516; In re Dyke, 6 P. D. 207; In re Reynolds, 3 P. & D. 35.

(*q*) McLeod v. McNab, (1891) A. C. 474.

(*r*) *Ibid.* at p. 476. See also In re Edge, 9 L. R. Ir. 516; In re Chilcott, (1897) P. D. 223.

(*s*) Collins v. Elstone, (1893) P. D. p. 1; In re Reynolds, 3 P. & D. 35; In re Steele, 1 P. & D. at p. 576; Walpole v. Cholmondeley, 7 T. R. 138; In re Edge, 9 L. R. Ir. 516.

(*t*) McLeod v. McNab, (1891) A. C. 474.

expressing the testator's knowledge that the will referred to is a revoked will (*r*) are necessary; and by implication if the revived will is an exhaustive disposition of the testator's estate, and, by express language, if it contains a revoking clause, such will, operating upon its revival as a later instrument (*u*), revokes the former revocatory will itself (*v*).

The raison d'etre of this article is the most recent English decision in In re Chilcott (*w*).

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(*u*) Purcell v. Bergin, 20 App. R. 535.
(*v*) *Ibid.* Jenner v. Finch, 5 P. D. 111.
(*w*) (1897) P. D. 223.

EDITORIAL REVIEW.

The Constitutionality of Sunday Laws.

The Supreme Court of Nova Scotia, in the case of Regina v. Halifax Electric Tramway Co., noted in the Occasional Notes, p. 88, has decided that profanation of the Lord's Day, being a criminal offence at the time of the Union, is not a subject which can be dealt with in that view by the Legislature of a Province.

The question arose on an application for a writ of prohibition to the stipendiary magistrate of Halifax, to prohibit him from proceeding on an information charging the defendants with a breach of an amendment to a pre-confederation Act passed by the Legislature of Nova Scotia. In 1867 a statute of the old Province was in force in the following words:—"Any person who shall be convicted before a justice of the peace of shooting, gambling, or sporting, of frequenting tippling houses, or of servile labour (works of necessity and mercy excepted) on the Lord's Day, shall for every offence forfeit not less than one nor more than eight dollars, and in default of payment shall be committed to gaol for a term of not less than twelve hours nor more than four days."—R. S., 3rd ser., cap. 159, sec. 2. After the passing of the B. N. A. Act, the contention was, this became part of the jurisdiction of the Parliament of Canada, as being part of the Criminal Law. It was in fact grouped under the title "Of the Criminal Law and the Administration of Criminal Justice," and under the sub-title "Of Offences against Religion."

The Legislature of the Province, however, passed amendments to this Act, the one in question being an enactment whereby it was made an offence for a natural

person or body corporate to employ or direct any person to perform servile labour on Sunday. Other provisions were made as to the penalty and proceedings, which necessarily partake of the special character of the Act and need not be referred to in detail.

The defendants were charged under the Provincial amendment with having directed, permitted, allowed and procured one G. E. R., a motorman, to perform servile labour on Sunday, by driving, etc., a tramcar. The Revised Statutes in force in 1867 by the interpretation Act declared "persons" to include "bodies politic and corporate," so that the defendants were, in the opinion of the Chief Justice, within the original Act, and prohibited from performing any servile labour, if a corporation can be said to be capable of so doing. But the information did not so charge them, but charged them with the offence under the amendment, namely, directing the labour to be done. The direct question therefore arose, whether the Provincial Legislature had power to create a new offence, namely, directing labour to be done on Sunday.

The majority of the Court, Ritchie, J., Graham, E.J., and Townshend, J., held that the field was already occupied by the Criminal Law, and that the Provincial Legislature could not therefore deal with the subject in that aspect, though it might deal with the contract of hiring between master and servant, and so give one individual party to the contract a right as against the other. McDonald, C.J., dissented on grounds to be presently noted.

The decision of the majority proceeded purely on the ground that profanation of the Lord's Day had been made a criminal offence by a competent Legislature before Confederation, and probably was an offence at Common Law, and therefore the subject-matter is now within the sole jurisdiction of the Parliament of Canada. Graham, E.J., besides referring to the grouping of the statutes, whereby this matter appeared under Criminal Law and offences against Religion, referred to Blackstone's Com., vol. IV., where the subject is treated under "Public

Wrongs," or, as Blackstone says, " Crime or Misdemeanors." At p. 63 of that volume reference is made to various statutes imposing penalties for the doing of certain things on the Lord's Day. The great commentator does not mention profanation as a Common Law offence, but a reference to 1 East P. C. 5, and 1 Hawk., c. 6, ss. 1, 2, 3, would indicate that it was so regarded. And Graham, E.J., refers to a form of indictment at Common Law, in 1 Chit. Crim. Law, 20, for Sabbath-breaking and profaning the Lord's Day, by keeping open a shop; and to Bishop on Crim. Law, vol. II., sec. 951, for the statement that profanation was a Common Law offence. Apart from this question, however, if it was a statutory crime the same result would follow. Before Confederation there was no public offence that was not a crime. Such a thing as an offence not being a crime could only arise under our system, or some one like it. And indeed the prototype of the Act in question, and the Act of this Province also, seems to have been an Act, 29 Car. II., c. 7, which provided that no person might do any work of his ordinary calling upon the Lord's Day, works of necessity and charity only excepted, under a penalty of five shillings; and we therefore inherited this as a portion of the Criminal Law.

The ground upon which the Court proceeded then seems perfectly clear, that the subject—profanation of the Lord's Day—had been taken into the criminal law, if not already an offence, by various statutes, and being a part of the criminal law could not be dealt with in that aspect by the Legislature of a Province.

Reference was necessarily made to Regina v. Wason, 17 nt. R. 58; 17 App. R. 221, in which it was held that the Provincial Legislature had power to impose a penalty on persons selling adulterated milk to cheese or butter factories. The ground on which this well-known case was decided was that it was not for the purpose of constituting a new crime in the interests of public morality, but of protecting buyers from imposition. The ground is a very thin one, as all criminal laws are for the protection

of individuals, and through them society in general. But there is no doubt that a Province may create a new offence without being able to make it a crime. The point in this case is, can it deal with a subject already constituted as a crime by competent authority?

Perhaps the best illustration of the subject is to be found in two other Ontario cases, Regina v. Boardman, 30 U. C. R. 552, 1 Cart. 676; and Regina v. Lawrence, 43 U. C. R. 164, 1 Cart. 742. In the latter case a provincial enactment, which provided that any person tampering with a witness in a prosecution under the Liquor License Act, was guilty of an offence, was held to be *ultra vires*, because tampering with a witness was already a Common Law offence. While in the former it was held that compounding the offence of violating the same Act, was within the jurisdiction of the Legislature, as the offence was one created by the Act itself, and not a crime.

While their Lordships agree that the Legislature might arrive at the same end in another way, namely, by legislating directly on the ability to contract as between the parties themselves, they were of opinion that the enactment in question was not of that nature, but was of a public character, intended to create an offence toward the public, punishable at the instance of any informer.

The reasoning of the Chief Justice, in his dissenting judgment, is rather difficult to follow. He holds that the original statute is still in force, which is undoubtedly correct. He then deals with the amendments. The amendments increasing the penalties do not, he says, create any new offence. "This statute is purely one of procedure." And the remaining clauses are "purely directory as to procedure in the enforcement of the Act." Criminal procedure, however, is a subject of Dominion jurisdiction, and any Provincial Act on the subject would necessarily be void. So, with regard to penalties. If the offence is a crime, the Province cannot deal with the penalty. Otherwise, the Provinces might abolish hanging and institute imprisonment as the punishment for murder.

His Lordship, however, goes on to say that the amendments did not create any new offence, but he refused to consider that as it was wholly within the jurisdiction of the magistrate to determine it, and therefore prohibition should not be awarded. While due respect must be given to his Lordship's views, it does seem as if this opened the door to the possibility of an increase of jurisdiction by magistrates, who might decide that murder was an offence within the same statute without fear of interference by a higher Court. In another place, however, his Lordship thinks that the original enactment was merely a "police or municipal law of the Province, and nothing more."

On the whole this case opens up a most interesting subject, and one capable of a great deal of discussion. No doubt the advocates of provincial interference with the existing Sunday laws in this Province will find the case a very formidable obstacle.

Reference to the Ontario Statute would lead to the same conclusion. In the Consolidated Statutes of Upper Canada, which were in force at the time of the Union, profanation of the Lord's Day is grouped under "Criminal Law." The statute contains provisions of totally different characters *inter se*. Some sections are devoted to making certain acts offences, while others affect the validity of contracts made on Sunday, and others deal with civil actions. No doubt, those sections which deal with the validity of contracts made on Sunday are within the jurisdiction of the Legislature; but, if the Nova Scotia case stands, the Provincial Legislatures cannot extend the other portions of the Act and otherwise widen their scope. It is to be observed, however, that the Interpretation Act, cap. 2, sec. 12, declares that "person" shall include any corporation. This precise point does not seem to have been referred to in the Court of Appeal in A.-G. v. Hamilton Street Railway Co., 24 App. R. 170, but the Court held that corporations were not affected by it, as it was impossible to inflict the penalty of imprisonment.

BOOK REVIEWS.

The Year Book of British Columbia and Manual of Provincial Information, to which is added a chapter containing much special information respecting the Canadian Yukon and Northern Territory generally. By R. E. GOSNELL, Librarian Legislative Assembly and Secretary Bureau Statistics, Victoria, B.C. 1897. Toronto: The Carswell Co., Limited.

We are not as a rule favoured with books that are not law books for notice. But we have peculiar pleasure in bringing this book to the notice of the public. As a compilation of all information—historical, antiquarian, constitutional, judicial, mercantile, agricultural, mining and economical—it is unrivalled. One can find almost anything respecting the Province somewhere in it. It is adorned with portraits of men of the day of the Province and of those who were pioneers in the civilization of the beautiful Province, as well as pictures of interesting parts of the country and illustrations of some of the industries. The account of the issue between Canada and the United States upon the Alaskan boundary states the points clearly, and there accompany the book maps of the Yukon and the mineral districts of the Province.

A Digest of Australasian Mining Cases as decided in the Supreme Courts of Victoria, New South Wales, Queensland, South Australia and New Zealand, and on appeal therefrom to the Privy Council. By JAMES G. EAGLESON, B.A., LL.B., author of "The Liability of Employers," and joint author of "The Victorian Digest, 1885-90," "The

Victorian Digest, 1890-95," and Duffy and Eagleson's "Transfer of Land Act, 1890." W. A. SANDERSON, M.A., LL.M., joint author of "The Victorian Digest, 1890-95." And BERNARD P. O'DOWD, B.A., LL.B., joint author of MacHugh and O'Dowd's "Local Government Acts," Barristers-at-Law. Melbourne: Charles F. Maxwell. London: Sweet & Maxwell. 1897.

The probability that a good deal of litigation touching mines and mining rights will arise in Canada should make this digest of great use here. There are no less than 522 columns of cases on every imaginable phase of the subject. It is true that a great many cases are of local application only, but a very great number are of general application, and it is not improbable that mining legislation will follow the lines of the experienced colony on such a subject.

YORK LAW ASSOCIATION REPORT, 1897.

There are at present 333 members of the Association, and 294 members have paid their fees for the year 1897. During the year 16 practitioners became members. One member died, and 47 members severed their connection with the Association by removal from the county, or resignation, or by being posted under the rules for non-payment of fees.

There are now 3,424 volumes in the library, 203 having been added during the year. The most important addition during the year comprised Cartwright's Constitutional Cases. The value of the books in the library is now estimated as follows: Reports and Statutes, $7,705,08; Text Books, $2,833.26; Periodicals, $1,462.57; total, $12,000.91. Insurance to the extent of $10,000 has been effected upon the library and property of the Association.

Following a custom of our past presidents, a portrait of Mr. Shepley, Q.C., president for the year 1896, has been presented to the Association by Mr. Ritchie, Q.C., the retiring president.

The work of consolidating the Rules of Practice was completed during the past year. The changes suggested by the commissioners appointed to consolidate these rules was submitted to the Committee upon Legislation, appointed at the last annual meeting. That committee gave a great deal of time and consideration to the memorandum and made an elaborate report to the commissioners. This was followed by an interchange of views between the committee and the commission, and the adoption of a large part of the suggestions made by the committee. The members of the Association and the profession at large

are much indebted to the members of the Legislation Committee for the time and attention which they so willingly, and without remuneration, gave to the consideration of the serious changes involved in the consolidation.

The attention of the Association is again called to the approaching completion of the court house in Toronto. Without doubt, the present accommodation afforded to the library will not be available for any length of time. The trustees understand that provision is not being made for the immediate accommodation in the new building, which will be available for a library and reading rooms. The Board trust that their successors will take up the question with a view to seeing that the provisions of the statute, which require accommodation to be furnished in the court house for the Association, are fully and fairly complied with.

The trustees record the death during the year of Mr. W. G. Murdoch.

After this report was submitted and adopted the following officers were appointed for the ensuing year: President, Wm. Mortimer Clark, Q.C.; Vice-President, J. H. Macdonald, Q.C.; Treasurer, Walter Barwick; Curator, Angus MacMurchy; Secretary, Shirley Denison; Trustees, J. B. Clark, Q.C., R. J. Maclennan, W. E. Middleton, D. W. Saunders, D. Fasken, C. D. Scott; Auditors, H. M. Mowat, Goodwin Gibson.

The Committee on Legislation: John Hoskin, Q.C., LL.D., E. D. Armour, Q.C., D. E. Thomson, Q.C., T. Langton, Q.C., D. W. Saunders, Douglas Armour, W. H. Blake, W. E. Middleton, E. T. English, C. A. Masten.

THE BULL AND THE SCOW.

'The skipper never dreamed of harm,
As he moored his scow 'longside a farm
Upon the river.

He made all fast with a rope of hay,
To keep the craft from floating away
A-down the river.

A bull it was, and not a cow,
That strayed from the bank upon the scow
Upon the river.

He first looked this, and then that, way,
And then he looked at the rope of hay.
Gurgled the river.

He looked, and smelled, and then he ate,
And the scow sailed off with its precious freight
A-down the river.

The skipper's remarks were not polite,
As he chased the scow with all his might
Along the river.

And the farmer's speech was quite profane,
As he followed the skipper with might and main
Along the river.

But the scow sailed on till it struck with a thud,
And pitched the bull, who was chewing his cud,
Into the river.

So the scow was wrecked, and the bull was drown'd,
And the Crowner's Quest a verdict found
Against the river.

But the farmer swore that he'd have full
Damages paid for the loss of his bull
Drown'd in the river.

And the skipper swore that the farmer should pay
For the loss of the scow by the eating of the hay
Upon the river.

So, in the heat of their agitation,
They plunged headlong into litigation,
As long 's the river.

And now they've learned that, whoever was wrong,
They can never get their differences settled, as long
As runs the river.

THE

CANADIAN LAW TIMES.

APRIL, 1898.

EXECUTOR'S RIGHT OF RETAINER.

THIS term has been used to denote two distinct rights, each of which depends on different principles, and confusion is often caused by this double use of the term. In strictness, it should be applied only to the right of the executor to retain his own debt out of the assets come to his hands in preference to all other creditors of the same class, a right which, as will presently appear, has been abolished in this Province.

It has, however, also been used to describe the right of the executor to retain out of the share of a beneficiary a debt due by such beneficiary to the estate.

A further source of confusion to the practitioner in this Province has arisen from the fact that the law as laid down in the English text books differs from the law in force here. A consideration of the principles upon which these rights are respectively founded, and of the differences between the law in force in England and that in force in this Province, may accordingly be found of use. It is proposed, therefore, to consider in each case what the present law is in this Province, and show how our legislation has modified these respective rights as they originally existed, and then to point out the difference between our law and the English law. In doing this it will be convenient to consider each right separately.

First, then, as to an executor's right of retainer, strictly so called, or the right of the executor to retain

his own debt out of the assets come to his hands in preference to all other creditors of the same class. This right is really part of the right which an executor formerly had (and which he still has in England) to prefer one creditor to another of equal degree. It was said that as an executor could not sue himself and could not therefore gain that priority which a creditor gets by showing diligence and obtaining a judgment, it was only fair that he should have the right to retain his debt out of the assets in his hands, and as he had the power to give one creditor a preference over another, it was considered just that he should be able to exercise such power of preference in his own favour.

By section 28 of 29 Vict. c. 28, now R. S. O. c. 129, s. 34, it was enacted as follows: "On the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts, shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another, but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate." The effect of this section was considered first in Bank of British North America v. Mallory (*a*). This was an action by a creditor who had not been paid, against the sheriff and the executor and the creditors who had received any of the proceeds of a sale under execution in an action against the executor for a declaration that under the above section they were entitled to have all the real and personal estate distributed *pro rata* among all creditors. It was contended by the defence that the Act merely abolished the distinction between different classes of debts, allowing creditors who had obtained judgment and execution the priority which

(*a*) 17 Gr. 102.

they had before the passing of the Act. It was held, however, that this was not the correct construction of the section. Spragge, C., at p. 106 of his judgment, speaking of defendant's contention, says: "Further, it would place the personal representative himself in cases where he is a creditor in an unequal and unfair position as he cannot at law sue himself, and as the Act abolishes his right of retainer he would be postponed to all creditors who chose to sue. The Act prevents his placing himself before others; it is evident that it is not intended he should be placed after others." This section was further considered in Clarke v. Chamberlain (*b*), where it was held that its effect is to disable an executor from giving preference to one creditor over another, so that if he pays one in full, the presumption is that he has sufficient to pay all. It was further decided in this case that if a creditor receives more than his *pari passu* share he may be ordered to refund at the instance of other creditors; and in a recent case of Leitch v. Molsons Bank (*c*), it was held that a creditor cannot be ordered to refund at the instance of the executor.

In the above cases right of retainer was only incidentally considered, but in Willis v. Willis (*d*) and Re Ross (*e*) it was directly in question. In Willis v. Willis the executor had paid out more than had come to his hands and claimed to be reimbursed, but it was held that "he could not by paying off creditors of the estate create a demand in his own favour that would give him a right of retainer in priority to other creditors, and that he was only entitled to be paid *pro rata*."

Re Ross decided that where the estate of a deceased person is insolvent, the provisions of the above section displace any right on the part of the executor to retain in full.

In England, as will hereinafter appear, an executor or administrator may before an administration decree

(*b*) 1 Ont. R. 135, affirmed 9 App. R. 273.
(*c*) 27 App. R. 621.
(*d*) 20 Gr. 396.
(*e*) 29 Gr. 385.

retain his own debt, or pay a debt due to another creditor notwithstanding it is barred by the Statute of Limitations. Re Ross deals also with this question, and it might seem from the head note that the rule is laid down generally that in every case any creditor may set up the Statute of Limitations against an executor claiming as creditor. But if the facts of the case and the cases cited on this point in the judgment are looked at it will be seen that all that is decided is that in an administration by the Court an executor cannot retain a debt or a portion of a debt which is barred by the statute—a rule which was in force before the above section was passed. And it is submitted that in an administration out of Court, an executor still has, as he always had, his right of retainer notwithstanding that the statute has run against him, though by reason of the section above set out he can only retain a *pro rata* share of the debt.

In England, the enactment which corresponds to our section 32, is Hinde Palmer's Act, 32 & 33 Vict., which provides as follows: "In the administration of the estate of every person who shall die on or after the first of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt, but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or law to the contrary notwithstanding. Provided always, that this Act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt."

It will be seen that the above section is not so wide as our section, and does not profess to abolish preferences, and, accordingly, as might be expected, the course of decision under it has been different. There are numerous cases decided under this section, but the only ones

necessary to notice here are In re Williams (*f*), In re Jones, Calver v. Laxton (*g*), In re Briggs (*h*), and In re Bentinck (*i*). The first of these, In re Williams, was decided under the English statute shortly after Bank of B. N. A. v. Mallory was decided here, and the same contention was raised as was raised under our statute, viz.: that although the statute had abolished the distinction between the different classes of debts, it had not abolished that priority which a creditor earns by his diligence in being the first to take proceedings. This was held in this case to be the correct construction of the English section, but as has been seen above, it was held not to be the correct construction of our section. Sir John Wickens, V.C., in his judgment in Re Williams, at p. 273, says: "I can find nothing in the statute to take away that reward for diligence which a creditor is supposed to earn by being first to take proceedings."

Re Jones, Calver v. Laxton decided that the effect of the section was not to give the executor, who was a simple contract creditor, the right to retain in priority to a specialty creditor, but that as the Act had augmented the fund for payment of simple contract creditors, it has to that extent enlarged the right of retainer. This case was followed in Re Briggs.

In re Bentinck was a case of a debt due to the Crown, but the cases on retainer were reviewed in the judgment and the principle laid down in In re Jones as applicable to right of retainer by an executor was followed.

As mentioned above, it should be noticed that the right of retainer only applied to administrations out of Court. Courts of Equity have always leaned against preferences, and when the estate was administered by the Court there was no such right and the distribution was *pari passu*.

(*f*) L. R. 15 Eq. 270.
(*g*) 31 Ch. D. 440.
(*h*) W. N. 1894, 162.
(*i*) L. R. (1897) 1 Ch. 673.

Having now considered right of retainer strictly so called, and noticed the differences between the law of this Province and that in force in England in reference to such right, it remains to consider the other right which has to some extent usurped the name of the right of retainer strictly so called. This is the right of the executor or administrator to retain out of the share of a beneficiary a debt due by such beneficiary to the estate.

This right is treated by Williams under the head of Release of Debts by Legacies (*j*).

Boyd, C., in his judgment in Tillie v. Springer (*k*), describes it as follows:—

"The right is not one of 'set-off' or 'retainer' in the proper sense of these terms, but it is, viewed from the side of the beneficiary, his right to receive payment of the legacy, having regard to the amount of the debt due testator's estate, and viewed on the side of the executor, his right to be paid the debt out of the fund in hand."

And in In re Akerman (*l*), Kekewich, J., at p. 219, says: "The Lord Chancellor, Lord Cottenham, in Cherrie v. Boultbee, took occasion to remark that the expression 'set-off' is very inaccurately used in cases of this kind, and he might have added no doubt that inaccuracy implies confusion. I will venture to add to that remark that the term 'retainer' is also inaccurately used in cases of this kind. I have heard more of 'retainer' in this case than I have heard of 'set-off,' but neither the one term nor the other can really be used with propriety, and either I think equally introduces confusion."

This right does not depend upon the right of preference, and therefore has not been abolished by the legislation abolishing preferences. On the contrary, the effect of our provincial legislation has been to enlarge it.

As real estate did not, before the Devolution of Estates Act, devolve on the personal representative, this

(*j*) Williams on Ex., 9th ed., pp. 1171, *et seq.*
(*k*) 21 Ont. R. 585, at p. 588.
(*l*) L. R. (1891) 3 Ch. 212.

right did not before that Act apply to real estate unless the executors were also trustees of the real estate. The case above cited of In re Akerman illustrates what the law would be apart from the Devolution of Estates Act. In that case the right under consideration was claimed where residuary real and personal estate was given to trustees to pay debts, etc., and to divide. It was contended that they could not exercise this right as regards proceeds of realty. Kekewich, J., at p. 218, says: "As regards the residuary personal estate . . . there has not been any substantial contention that the debtors must not make good their debts before they can take any part of that residue. . . . But the difficulty is this. The residuary gift is not confined to personal estate, but comprises real estate also. . . . The argument is that . . . as regards the proceeds of the sale of the real estate that principle does not apply. . . . I think I must decide this case on the general principle. . . . Why should not this be applied to a case like this, where the property is put together and the whole is given to the same persons upon the same trusts? The principle is the same, the contributor to the mass is the same whether the mass be held by a trustee or by an executor, and it would to my mind be introducing mere technicality into the principle . . . to say that because there is no legal personal representative of the testator, because the representative is a trustee and not an executor, therefore the contributor is to get off."

And in In re Taylor, Taylor v. Wade (*m*), the fact of the person to pay and the person to receive being the same is mentioned as being material.

It would appear therefore from these and other cases that, apart from the Devolution of Estates Act, where the trustees of the realty and the representatives of the personalty are the same persons, when the person to receive and the person to pay are the same, that an executor may retain out of proceeds of realty. Now under the

(*m*) L. R. (1894) 1 Ch. 671.

Devolution of Estates Act, as all property both real and personal devolves on the personal representative, the person to receive the debt and the person to "pay" the devisees is the same. It would accordingly follow, if the above statement of the law be correct, that an executor since the Devolution of Estates Act may retain a debt due by a beneficiary out of such beneficiary's share of the real, as well as of the personal, property. This point was considered in the above cited case of Tillie v. Springer (*n*). In that case the same objection was made as that taken in In re Akerman, viz., that the executors could not retain out of the proceeds of the real estate, but it was held by Boyd, C., that the executors, being (under the Devolution of Estates Act) the representatives of the testator's estate for all purposes, had a right to "impound" shares of real estate coming to beneficiaries who were indebted to the estate.

There is another point, however, still open for decision under our law. In England it is laid down in the older cases that this right of retainer does not apply to a specific devise or to a specific bequest of leaseholds. It was, however, decided in Re Taylor (*o*), that when a debtor to the estate is a specific legatee of a business represented by moneys in the hands of the executors, the executors may retain such moneys as against the debt. Chitty, J., at p. 674, gives the reason as follows: "This law is settled that as against a specific devise, which is outside the duties of the executor, there is no retainer. It is equally plain that in the case of a specific bequest of leaseholds there is likewise no right of retainer. . . But I find here on either side a liquidated demand. The executors have money in hand payable to the legatee, and I think I should be unnecessarily narrowing the doctrine of retainer were I to hold that the right did not exist in this case. The person to pay and the person to receive is the same."

Note the reasons above given, viz., that dealing with a specific devise is "outside the duty of an executor,"

(*n*) 21 Ont. 585.
(*o*) L. R. (1894) 1 Ch. 671.

and "that the person to pay and the person to receive are not the same." These reasons would not apply under the Devolution of Estates Act, and therefore it may be suggested that, if the point comes up for decision, our Courts will follow the principle laid down in In re Akerman with respect to a specific legacy.

Another point to be noted is that an executor may retain a debt due to the testator even though barred by the Statute of Limitations. See In re Akerman. But where the debt has become irrecoverable in any other way he cannot retain it.

R. B. HENDERSON.

JUNIOR COUNTY JUDGES.

The position of the above class of officials has been disregarded by our legislators, is not at all known to laymen, and very little understood by even the greater portion of the legal profession.

The powers and duties of the juniors were at first restricted, but by the Ontario Statute of 1873, cap. 8, sec. 47, assented to on the 29th of March, their duties and powers were made equal with the Senior Judges. Upon the passing of that statute, juniors became practically County Judges.

Prior to and at this time juniors were receiving the same salary as the seniors and other County Judges.

By the Dominion Statutes of 1873, cap. 31, sec. 10, assented to 23rd May, a readjustment of the salaries of all the judiciary was made. The salary of the Senior or County Judge was fixed at $2,000 and $200 travelling allowance, and after three years' service an increase of $400 per year was added.

The salary of each Junior Judge "of a County Court" was fixed at $2,000 per annum and $200 travelling allowance.

The then Minister of Justice construed this statute as not extending the increase of $400 to juniors, because they were "not County Judges." It was a matter of doubt whether such construction was correct, or was even so intended. It is difficult to conceive why this unjust discrimination should be extended to the juniors during the period of twenty-five years.

It will be noted that a junior requires the same qualification as the Senior or County Judge. They are appointed only in large counties where the travelling necessary to perform judicial work is extensive, they are required by statute to take the Division Court Circuits.

They perform all municipal and other work outside of the county town, in fact all work to which the expense of travelling is attached. Their $200 travelling allowance in large counties is absorbed as such.

The seniors do not travel, therefore the $200 travelling allowance to them is treated as salary. The senior then receives $2,600 per year salary from the Dominion Government, while the junior receives only $2,000. Moreover, the senior receives the surrogate fees amounting to from $500 to $1,000 per year, and also other emoluments in which the junior does not participate, except in the counties of York and Carleton, where the surrogate fees are considerable, and where the juniors get a portion of the surplus over $1,000, which goes to the senior.

In smaller counties there is comparatively little travel, and to Judges here the $200 allowance affords a surplus. But these Judges receive the $400 increase. They also receive the surrogate fees and other emoluments besides. The Junior Judges therefore performing more work as a rule than the Senior or other County Judges, receive from $1,000 to $1,500 per year less salary, though some of the juniors have served sixteen years and upwards.

Another unfair discrimination against the juniors is this: a Junior Judge may serve as such for forty years, were it possible, and then, on being appointed senior or other County Judge, he must still serve another three years upon junior's salary before he becomes entitled to the $400 increase. This is like Jacob serving Laban for Rachel.

Take an example. The Junior Judge of the county of Ontario was appointed in 1874. In 1897, upon the death of the senior, he was appointed County Judge. He must serve three years longer before he becomes entitled to the increase. The Senior Judge of the county of Huron was appointed in 1896, after three years' service he receives the increase. In the former case, it requires twenty-six years' service, practically as County Judge, to become entitled to the $400 increase. In the

latter, only three years' service. This, it is submitted, is unfair, ungenerous, and unjust.

In the larger counties where there are juniors the other county officials, viz., the sheriff, registrar, County Court clerk, and clerk of the peace, and county attorney, all receive larger sums annually than the salary paid to the juniors. And a few local masters, stipendiary magistrates, and many officials at Osgoode Hall, receive salaries greatly in excess of those of Junior Judges.

For the amount of work performed in such larger counties juniors are paid less than any other class of officials in the Province.

The juniors of the larger counties applied to the former administration to be placed upon the same footing with Senior and other County Judges as to increase. The only practical answer they received was a large increase to their numbers. It is submitted that juniors were appointed in many counties where a single Judge had for years performed the whole work, and at a time when there was a larger volume of law business.

When the former Liberal administration left power in 1878 there were only eleven juniors in the whole Province. The succeeding administration, however, increased that number to twenty-two.

The present Government has wisely adopted the principle that, when a senior dies, or retires, in a county where one active Judge can perform the work, the office of junior is dispensed with.

It is confidently submitted and expected that the present administration will remove the unfair and unjust discriminating against Junior Judges.

AMICUS CURIÆ.

IRREGULAR FORMS OF BILLS AND NOTES.

A very common mistake made by uninformed persons, including not a few among the mercantile class, is in preparing bills and notes which are to be endorsed by a third person as a surety for the acceptor or maker. Instead of making the bill or note payable to the order of the intended endorser, it is frequently made to the order of the payee himself, and when the endorser puts his name on the back of it, the unsophisticated payee puts it away in his safe, firmly convinced that his security is all right. The bill or note, if not paid at maturity, is usually protested, but when the holder attempts to enforce payment from the endorser, he begins to realize the legal difficulties in his way.

There is a great deal to be said in favour of the French law, which prevailed in Quebec before the "Bills of Exchange Act, 1890," under which such an endorser (or "aval," as he is called), is held liable to the payee as a warrantor, even without any protest or notice of dishonour. Under some of the American and older English cases also, very slight circumstances were seized upon by the Courts, in an action by the payee, to hold such an endorser liable either as a joint maker or as a guarantor; but the decision of the House of Lords in the case of Steele v. McKinley (*a*), definitely settled the law of England against such a contention. The decisions of our own Courts in Robertson v. Lonsdale (*b*), Duthie v. Essery (*c*), and Robertson v. Davis (*d*), are to the same effect, and clearly establish the principle that under no circumstances can the payee of a note or the drawer of a bill maintain an action against an endorser on the instrument itself.

(*a*) 5 App. Cas. 754.
(*b*) 21 Ont. R. 600.
(*c*) 22 A. R. at p. 193, *per* Burton, J.A.
(*d*) 27 S. C. R. at p. 574, *per* Sedgewick, J.

By section 56 of the Imperial Bills of Exchange Act, which adopted the principle approved of in the case of Steele v. McKinley, it is provided that, "Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course," and this provision is embodied in section 56 of our own Act. It therefore becomes necessary to consider who is "a holder in due course." Under the decisions above referred to, the drawer or payee cannot sue the endorser, who would be practically a subsequent endorser to himself. By section 29 of our Act, which is similar to section 29 of the Imperial Act, "a holder in due course" is defined to be "a holder who has taken a bill, complete and regular on the face of it, . . . before it was overdue and without notice that it was previously dishonoured, if such was the fact," and who "took the bill in good faith and for value, and at the time the bill was negotiated to him, had no notice of any defect in the title of the person who negotiated it."

This definition, which is sufficiently specific, would seem to make it very difficult for the drawer or payee to avail himself of the endorsation, at least without rendering himself liable as a prior endorser, to recoup the party who is compelled by the "holder in due course" to pay the note, unless indeed he indorsed the bill or note "without recourse," and before maturity, to a holder for value without notice. If, however, the recent decision of the Court of Appeal in Duthie v. Essery (*e*) is good law, the difficulties are very much lessened. In that case Essery made a note payable to Duthie's order, which was endorsed by Keith, as a surety for Essery, and was delivered to Duthie. After the note had become due and was protested for nonpayment, Duthie endorsed it to his son, by writing his name on the back beneath Keith's signature, and the action was brought in the name of the son. Burton, J.A., held (p. 193), that it was immaterial when the transfer was made, and Maclennan, J.A., held (p. 195), that the plaintiff was "a holder in due course," under section 56, and that the defendant Keith was

(*e*) 22 App. R. 191.

liable; with which Hagarty, C.J., agreed, Osler, J., being absent. Section 29 does not appear to have been referred to either by the Court or the counsel, and as the decision contravened at least two of its important provisions, the section must have been overlooked. For example:—

1. The note could not be said to be "complete and regular" where the payee had endorsed it below instead of above the signature of the endorser whom it was attempted to hold, as a link in the chain was missing.

2. The plaintiff became the holder of the note after instead of before maturity, and had notice that it had been protested for nonpayment, as well as of all other defects.

It is not likely, therefore, that this decision will be followed in any similar case. If it should be held to be good law, section 29 of the Act is practically repealed.

It seems to the writer that it would have been better for Parliament, when framing the Act, to have adopted the simple and certain provisions of the French law, instead of the principle laid down in Steele v. McKinley. No doubt if everybody knew how to draw bills and notes properly, there would be no difficulty, but as many people will go on making them in the irregular way above referred to, and will not know enough to transfer them to "a holder in due course," they will frequently be deprived of any recourse against the endorser.

M. J. GORMAN.

EDITORIAL REVIEW.

Succession Duty on Foreign Assets.

The question of the mode of computing the value of an estate on application for probate for the purpose of ascertaining whether it was liable to duty, having regard to the fact that the assets in Ontario did not amount to $100,000, though when supplemented by foreign assets they exceeded that sum, came before Judge McDougall in Re Renfrew, a note of which will appear in our next issue.

Mr. G. R. Renfrew was domiciled in Quebec at the time of his death, and possessed assets in that Province exceeding $50,000, and assets in Ontario exceeding $65,000. Application for probate of his will was made to the Surrogate Court of the county of York, Province of Ontario, and the solicitor for the Treasury having become aware that the aggregate value of his estate exceeded $100,000, refused to authorize the grant of probate without payment of succession duty, or security being given therefor. Notice of a motion for an order for the grant was given, but no one appeared for the Crown on the motion.

Judge McDougall held that he had jurisdiction to determine the question under the Surrogate Courts Act, R. S. O. c. 59, ss. 17 and 18. He then turned to the interpretation of the Succession Duty Act. Section 4 defines the property subject to succession duty as "all property situate in this Province . . . whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy." Sub-section 3 declares that, "where the aggregate value of the property of the deceased exceeds $100,000 . . .

it will be liable, etc." His Honour then proceeded to hold that the object of the Act was to tax property actually situate in the Province, and property brought into the Province for distribution by the executor. The "aggregate value of the property" in the case of a person dying domiciled without the Province, he held, could only mean the aggregate value of property actually situate within the Province. The testator being domiciled without, none of the foreign assets would be brought into the Province. The Province could not tax anything not within its own borders. The 8th sub-section of section 5 indicates this very clearly, for it is only when foreign assets are brought into the Province for distribution that the Act renders them liable to taxation. His Honour accordingly held that the executors were entitled to probate without payment of succession duty.

Judge McDougall enjoys the distinction of having decided the matter in the same manner as the Judicial Committee in two Australian cases, though the cases do not appear to have been cited to him. We discussed a cognate question in Vol. XVI., at p. 296, where the two questions are referred to, viz., Blackwood v. Reg., 8 App. Cas. 82, and Henty v. Reg., L. R. (1896), A. C. 567. In the first case it was held that by the Victorian Act a legal personal representative in Victoria should, as regards the personal estate of the deceased, state accounts only of so much thereof as came under his control by virtue of his Victorian probate. The Act required the personal representative to file particulars of "the personal estate of or to which the deceased was at the time of his death possessed or entitled." Sir Arthur Hobhouse said, "Their Lordships think that, in imposing a duty of this nature, the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction." The second case followed this one, and also determined that foreign debts chargeable against the foreign assets need not be stated unless they exceed the foreign assets, and the excess is chargeable against domestic assets. Lord Watson said, "In a case like the present, where

the deceased was domiciled in Victoria, but had estate in another country, the purposes of the Act do not require that his executors shall include foreign assets to which their Victorian probate gives them no title."

These cases put the matter in a very plain way. The executor gets title only to the local assets. He has nothing to do with foreign assets, in this Province. He gets no title to them by his probate, and the Court has nothing to do with them. If he need not disclose them, need not even know of them, why should he be bound to disclose them as a condition of his getting probate in this Province? And how can he be asked to pay duty out of property which he cannot reach under his probate?

Insensible Statutes.

In Harris v. Can. Perm. L. & S. Co., 17 Occ. N. 424, the question arose as to the meaning of a clause of the Landlord and Tenant Act. Certain goods are exempt from distress for rent, "Provided that in the case of a monthly tenancy such exemption shall only apply to two months' arrears of rent." Judge McDougall pointed out that the exemptions applied to goods, not rent, and the proviso applied to rent. After endeavouring to put a meaning upon the proviso, he failed. "Rather than guess at its meaning, it is better to say that the words have no meaning at all."

In Green v. Woods, 7 Q. B. 178, a similar result was arrived at. In a statute respecting the avoidance of warrants of attorney, etc., where bankruptcy took place within a certain time thereafter, the words "unless judgment shall have been signed or execution issued" were insensible, but if read "unless judgment shall have been signed and execution levied," the clause made sense. Lord Denman, C.J. "If we find language used which is incapable of a meaning, we cannot supply one. It is true that we have here words which, as they stand, are useless; a circumstance, perhaps, not altogether unprecedented. But to give an effectual meaning we must alter not only 'or' into 'and' but 'issued' into 'levied.' It is extremely probable that this would express what

the Legislature meant, but we cannot supply it." Patteson, J. "It is better to say that the words have no meaning at all." Williams, J. "It is much safer to say that the words have really no meaning."

Landlord and Tenant—Forfeiture—Waiver.

In Bevan v. Barnett, 13 Times L. R. 310, to which we referred, Vol. XVII., at p. 124, Wright, J., held that where a landlord had given a notice to repair under the Conveyancing Act, and in default had begun an action to recover possession, he waived his right to recover possession by demanding rent which accrued after the notice. In Penton v. Barnett, L. R. (1898) 1 Q. B. 276, however, the Court of Appeal has overruled that case. The circumstances were the same. On 22nd September, 1896, a notice was given to repair. On failure to comply with the notice a writ was issued on 14th January, 1897, and a quarter's rent was claimed up to 25th December, 1896. Ridley, J., gave judgment for the defendant on the ground that the plaintiff had waived the forfeiture by demanding rent which accrued after the notice. The Court of Appeal reversed this judgment. A. L. Smith, L.J., said: "The defendant had such a notice and a reasonable time to comply with it; but it is said that the notice does not cover the breaches between December 25 and January 14. In my opinion this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given." With great respect for the learned Judge, this does not touch the question. With as much force might it be said that the breaches before 25th December were the same as those afterwards, and having elected to treat the defendant as tenant, notwithstanding the breach, he could not at the same time claim forfeiture. If the writ had been issued on the 26th December, could it have been said that the breach could have been taken advantage of when rent was at the same time demanded? If not, then the right to recover possession must rest upon the breaches subsequent to 25th December, as, indeed, his Lordship puts it. But as to these no notice was given. It is, in our

opinion, no answer to say that the previous notice was good; because on that hypothesis a landlord could, after giving such a notice, go on receiving rent for an indefinite time, and after the defendant was lulled into security suddenly bring an action for ejectment on the old notice. Claiming rent and receiving rent are the same for such purpose. The old cases put it that the landlord, having a choice, elects to treat the tenant as tenant, and cannot afterwards change his election and claim forfeiture.

Rigby, L.J., broadly put it that the claim for rent did not constitute a waiver of the forfeiture. That all that was laid down in Dendy v. Nicholl, 4 C. B. N. S. 376, was that an action for rent was as good as a waiver of forfeiture, as an action of ejectment was as a determination of the tenancy. Granted. How then can the two claims consist in an action? The action for rent is a waiver of the forfeiture which is claimed in the same action. To hold otherwise is to treat the notice, which must be particular and technical in its language, as hypothetical in its meaning. That is, "if you do not repair I will treat you as tenant for the purpose of recovering my rent, but as having forfeited the lease so that I may get possession." That is a very peculiar result to arrive at. His Lordship draws a distinction between a single act and a recurring, or rather a continuing breach. But why? The statute says nothing about it. If the recurring breach is waived once, must not a new notice be given? His Lordship's meaning is that a recurring breach cannot be waived, while a single act can. But there is no justification for such a distinction.

The decision is a merciful one to landlords, but it is a difficult one to comprehend.

Football and Manslaughter.

History repeats itself in small ways as well as great. In vol. XII., at p. 271, we referred to a case in which a football player had been indicted for manslaughter and was acquitted, though he had caused the death of another player. Regina v. Moore, 14 Times L. R. 229,

is another of the same kind. Mr. Justice Hawkins directed the jury, as Baron Bramwell had done in the former case, that the rules of the game were quite immaterial, and it made no difference whether the prisoner broke the rules or not. But he did not say, as did Bramwell, B., that if the rules were observed it might *be* reasonable to infer that the accused was not actu*ated* by any malicious motive or intent, and was not acting in a manner which he knew would be productive of injury. No one, however, the learned Judge continued, had a right to use force which was liable to injure another, and he left it to the jury to say whether the prisoner had used illegal violence. The verdict was "Guilty."

It is mentioned as an extraordinary circumstance that one of the witnesses in the case, who gave strong evidence against the prisoner, was himself killed in a football match a few weeks later.

Service of Process by Agreement.

A curious instance of subordinating the proceedings under the rules to the agreement of the parties is Montgomery v. Liebenthal, 14 Times L. R. 201. Certain parties, occupying the position of buyer and seller, agreed that their contract should be deemed to have been made in England, and to be performed there, and that the service of process upon a party residing in a foreign country might be effected by leaving it at the Consulate, and upon a party residing in Scotland or Ireland, by leaving it at the office of the London Corn Trade Association, and posting a copy to the address abroad or in Scotland or Ireland, as the case might be. Service having been effected as agreed, the defendant moved to set it aside on the ground that there was no power to make such an agreement. Phillimore, J., refused the motion, and the Court of Appeal affirmed his judgment. A. L. Smith, L.J., said that there was nothing to prevent the parties from making an agreement as long as they did not ask the Court to do something which it was by the rules prohibited from doing. There was no

rule to prohibit the Court from recognizing this agreement, and therefore it was valid. Chitty, L.J., gave judgment to the same effect.

In other words, the parties to an action may make any agreement to waive formalities in the proceedings between them, as long as it is not contrary to law. The agreement of parties or their solicitors in the course of an action would be recognized and enforced by the Court as long as the agreement is not a prohibited one. No one would dispute the right to make any agreement as to service as soon as the writ was issued, and if so, why should they not do so either immediately upon or before issue of the writ, or an indefinite time before it?

A Curious Custom.

The town bull is an historical character, who figures in a line of Shakespeare's Henry IV. He now turns up in the law reports. Lanchbury v. Bode, 14 Times L. R. 178, was an action by the plaintiffs on behalf of themselves and all other parishioners of a certain parish against the defendant, who was a widow, alleging "that it was an ancient custom of the parish that the parson, as the owner of the great tithes of the said parish, and as a charge thereon, should keep within the said parish a common bull and a common boar for the common use of the kine and sows of the parishioners at any time for the increase of cattle and pigs within the said parish; and that the defendant, as the present owner of the lands allotted in lieu of the great tithes, was bound to perform the said custom"; claiming an injunction "to restrain the defendant, her agents and servants, from omitting to provide and keep a bull and a boar in accordance with the custom, or from otherwise infringing the custom; and for damages." The tithes were owned by the dean and chapter of Rochester, and the plaintiffs alleged that "the said bull and boar were always provided and kept by the said priory, the said Dean and Chapter, etc., but the defendant has, although requested by the plaintiffs so to do, refused to provide and keep the same, and the plaintiffs, who, as two of the parishioners, are entitled to the use of the said bull and boar

for their cows and sows, have thereby sustained damage." Part of the defence was that there was, and always had been, a sufficient supply of bulls and boars in the parish, and that the plaintiffs had not suffered any damages. Kekewich, J., held the custom a reasonable one, but dismissed the action on grounds of no interest, and not germane to the curious subject matter of the suit.

A New English Digest.

Messrs. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd., announce the early publication of a new Digest, in sixteen volumes, royal octavo, which will be a consolidation of all previous Digests down to the end of 1897. Fisher's Digest and Chitty's Equity Index will be merged in the consolidation, which will include also a selection of Irish cases. In addition there will be published a supplemental volume to Dale & Lehmann's Overruled Cases. The price of this work is £20 in cloth, £23 in half-calf. For sale by the Carswell Co., Limited.

BOOK REVIEWS.

The Law of Evidence. By SIDNEY L. PHIPSON, M.A., (Cantab.), of the Inner Temple, Barrister-at-Law. Second edition. London: Stevens & Haynes. 1898.

This is a most useful compendium. The author states the rule of evidence, then explains its principles and limitations, and finally illustrates it. The matter is very much condensed, but is well arranged and easily explored. A most useful feature of it is the arrangement in parallel columns of cases of admissible and inadmissible evidence on analogous facts, showing at a glance the distinctions. An excellent index is appended, though, with the table of contents and a carefully arranged text, it is almost unnecessary.

Outlines of the Law of Torts. By RICHARD RINGWOOD, ESQ., M.A., of the Middle Temple and N. E. Circuit, Barrister-at-Law, etc., etc. Third edition. London: Stevens & Haynes. 1898.

This is an elementary book on Torts, based upon lectures delivered by the author. The arrangement is good, and the subject comprehensively and clearly dealt with.

The Civil Code of Lower Canada and The Bills of Exchange Act, 1890, with all statutory amendments verified, collated, and indexed. By ROBERT STANLEY WEIR, D.C.L., advocate of the Montreal Bar. Author of "An Insolvency Manual," etc., etc. Montreal: C. Theoret. 1898.

This is a compilation in a handy form of the Code with amendments. It is not annotated, but it is an accurate English translation of the Code, containing references to the Civil Code, the Code of Civil Procedure, and the Code Napoleon at the various articles founded thereon.

THE
CANADIAN LAW TIMES.

MAY, 1898.

THE LAW AND THE SOLDIER (a).

THERE has always been a close alliance between the profession of the law and that of arms, and there are few practising lawyers who have not, at some time in their lives, had to have recourse to their learning in order to better understand the Army Discipline Act as it has affected themselves. In this Province the volunteer and his services have been recognized by lawyers in a tangible way, and it is within memory that the Benchers of the Law Society, influenced by a wholly meritorious sense of patriotism, presupposed in students who were under arms in the rebellion of 1885, sufficient scholastic attainment, and permitted them to be called to the bar without the harassing trials of an examination.

Before touching upon the main subject of the duty of the soldier to the civil power, it may not be uninteresting to refer to some privileges which the militiaman has with regard to his civil life, and as more particularly existing in the Province of Ontario.

The officers, non-commissioned officers and men of volunteers, while they continue such, are exempted from serving on juries when certified by the officer commanding such corps.

No non-commissioned officer or private of the volunteer force, certified by the officer commanding the company to

(a) Extracts from a paper read before The Canadian Military Institute, Toronto.

which the volunteer belongs or is attached as being an efficient volunteer, is assessable for statute labour and road work, or poll tax in lieu thereof.

The choice of the word "volunteer" by the draftsman of these statutes is unfortunate, but goes to show their antiquity.

The militiaman cannot be charged toll on any road, bridge, wharf or landing-place, when in proper staff or regimental uniform.

A commanding officer is not subject to an action of slander by a soldier under him. The messman of "A" Battery sued Captain (now Lt.-Col.) Cotton, then commanding that battery, for damages for having repeatedly called him a thief, a robber, and a liar. The commanding officer found in the scullery, under the care of the plaintiff, a preserving pan belonging to the commanding officer, and it was in reference to this that the language was used. Sir Wm. Meredith, C.J., followed Dawkins v. Lord Rokeby (*b*), where Willes, J., said, "with respect to persons who enter into the military state, who take Her Majesty's pay, and who are content to act under commission, although they do not cease to be citizens in respect of responsibility, yet they are by a compact which is intelligible, and requires only the statement to commend it to the consideration of any person of common sense, become subject to military rule and military discipline. It is clear that with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned, military men must determine them." His Lordship said that although the difficulty in question was about a preserving pan, which savours rather of the kitchen than the camp, yet it is not the less true that for the carrying out of war cooking utensils are almost as necessary as defensive weapons; yet if keeping Col. Dawkins under arrest for eight days for a personal slight was "a military question," then the question as to the defendant addressing the plaintiff as he did ought also to be a military question (*c*).

(*b*) 4 F. & F. 831.

(*c*) Holbrow v. Cotton, 9 Q. L. R. 105.

The militiaman's band cannot be stopped or regulated by municipalities under their powers relating to music in the streets; and the militia officer's charger has been declared to be exempt from seizure by distress (*d*).

The soldier, by becoming such, although he may be held accountable for his conduct to his military chiefs, is not in any way absolved from obedience to the ordinary civil and criminal law. Sir James Mansfield, C.J., said, "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad, that because men are soldiers they cease to be citizens; a soldier is gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. It is necessary for the purpose of preventing mischief and for the execution of the laws; it is not only the right of soldiers, but it is the duty of soldiers to exert themselves in assisting in the execution of a legal process, or to prevent any crime or mischief from being committed. It is therefore highly important that the mistake should be corrected which supposes that an Englishman by taking upon him the additional character of a soldier, puts off any of the rights or duties of an Englishman" (*e*).

These principles obtain to-day, and while public order requires the obedience of the soldier to the ordinary laws of the land, so does public safety require the assistance of the soldier for the suppression of lawlessness, when it takes the form of intimidation or the exercise of physical force.

The maintenance of public order ordinarily should, and very properly does, rest with the civil authorities. This is in accord with the genius of our institutions. While we are the most free people on earth, and are yearly becoming more trained in the science of self-government and self-restraint, and the suppression of unlawful public actions caused by strong political opinions, a sense of injustice or the frailty of human passions, and now seldom needing the assistance of armed military force; nevertheless, the sense of security from tumult must not lull the soldier into indiffer-

(*d*) Davey v. Cartwright, 20 C. P. 1.
(*e*) Burdett v. Abbott, 4 Taunt. 401.

ence or ignorance of his duty, should the constant war between capital and labour, the hunger and distress of the army of the unemployed, or the lamentable acerbity of religious and race faction occasionally afford an occasion for his interference.

Public disturbance which finds an outcome in acts calling for military interference, may warrant a reference to the grades in which it is manifested. The legal offences of an unlawful assembly, a riot and insurrection, and which are probably comprised in the terms "riot, disturbance of the peace or other emergency," of our Militia Act, presently to be referred to, are described thus: An unlawful assembly is an assembly of three or more persons, who, with intent to carry out any common purpose, or assemble in such a manner, or conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembly unlawful if they had assembled in that manner for that purpose. The reason for providing that an unlawful assembly is criminal, is that no one can see what may be the event of such an assembly (*f*).

A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

"It is the duty of every sheriff, deputy sheriff, mayor, or other head officer, and justice of the peace, of any county, city, or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded,

(*f*) Reg. v. Vincent, 9 C. & P. 95; Reg. v. Neale, 9 C. & P. 431.

silence, and after that, openly and with loud voice, to make or cause to be made a proclamation in these words, or to the like effect:—

'Our Sovereign Lady the Queen charges and commands all persons being assembled immediately and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

GOD SAVE THE QUEEN.'

2. All persons are guilty of an indictable offence and liable to imprisonment for life who:

(*a*) With force and arms wilfully oppose, hinder or hurt any person who begins, or is about to make the said proclamation, whereby such proclamation is not made; or

(*b*) Continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance."

"If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made, or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice of the peace" (*g*).

The law also provides for the saving harmless of the law officers and those assisting them in the endeavour to apprehend or disperse a mob. The commission of an act of violence by any one or more of those assembled is not necessary to make the assembly unlawful if its character and circumstances are such as are calculated to alarm not only foolish or timid people, but persons of reasonable firmness and courage (*h*).

An insurrection differs from a riot in this, that while a riot has in view some enterprise of a private nature, an insur-

(*g*) Crim. Code, secs. 83 & 84.

(*h*) Reg. v. Vincent, 9 C. & P. 109.

rection savours of high treason, and contemplates some enterprise of a general and public nature (*i*).

The circumstances of a meeting of citizens should be carefully considered by the authorities before action is taken to break it up. The right of free speech is a cherished institution of our race, and the danger must be great indeed which will warrant its suppression. Indeed, a public meeting is often a safety valve for discontent.

"There is no doubt that the people of this country," said Alderson, B., in Reg. v. Vincent (*j*), "have a perfect right to meet for the purpose of stating what are or even what they consider to be their grievances; that right they always have had, and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason." At the same time, prevention is better than punishment, and the law accordingly declares that an unlawful assembly may be dispersed although it has committed no act of violence; for it is better that individuals should be estopped before they proceed to outrage and violence; and a small amount of punishment in the first instance will probably save a great amount of crime afterwards. This proposition will probably not be quarrelled with: The interference of the militia should be practically confined to cases in which violent crimes are being or are likely to be committed, and to insurrections in which an intention is clearly apparent to execute some general political purpose.

But how much force should be used to effect dispersion? That is the grave question that can only be answered by saying, that different cases must depend on their own circumstances; and if only that force is used which occurs to a reasonable man in the fair and honest execution of his duty, the officer is exonerated, or, at most, the law will treat him with leniency, in case an indictment for assault or manslaughter or an action for damages follows. However, the excitement and loss of full reasoning power, which are usually incident to tumultuous times, make it inexpedient to put down riotous meetings by arms, except as a last resort; and it

(*i*) 21 State Tr. 644; Reg. v. Vincent, 9 C. & P. 94.
(*j*) 9 C. & P. 65.

is for this reason that the half hour's notice is given by the Riot Act. A writer observes: "The principles underlying this rule are sound, for, suppose the soldier was obliged to obey every command of his officer, an instance might then occur in which an officer, either through ignorance or cruelty, might give orders to fire upon a multitude whose conduct did not justify the attack; hundreds might be butchered within a few minutes, and the whole evil attributed to the error of a single individual. A soldier would always be justified in shedding blood, provided his commander gave the command, and the person in authority would be a giant of a hundred hands for the execution of evil. Such principles are abhorrent, not merely from the condition of free citizens, but also from the laws of humanity. Soldiers would become the objects of general apprehension; for every citizen would remember that in all institutions, however well regulated, and however much approved by experience, some members will always be found destitute of principle or wholly incapable of regulating their passions, who, to gratify their feelings of revenge, or in perfect recklessness of the miseries they are producing, may apply their formidable strength in opposing or destroying their fellow subjects" (*k*).

It is therefore for us to consider what is the position of the militiaman when he is compelled by law to go to the assistance of the civilian magistrate.

The provisions relating to this will be found in the Militia Act (*l*). It is to be noted that troops can be called out for prevention as well as suppression of an actual or anticipated riot or disturbance. No judicial interpretation has been given of the expression "disturbance," used in the Act, and it is probable that the Legislature meant it to cover the lesser offence of an unlawful assembly. The expression "other emergency" is added, so as, apparently, to provide for every possible emeute.

The officer in command is only to call out his forces upon the requisition in writing of three justices of the peace, and the requisition must state the actual occurrence of the riot, disturbance or emergency, or its anticipation. This is the

(*k*) 9 Law Mag. 66.
(*l*) R. S. C. cap. 41.

officer's warrant for turning out. The facts in the case of Crewe-Read v. County of Cape Breton, were that in March, 1883, a difficulty arose among the miners of Lingan, which ended in a riot. Captain Hill, No. 5 Company, "Argyle Highlanders," on the requisition of the warden and three justices of the peace, ordered out his company and proceeded with it in aid of the civil power. The requisition, which cannot be commended for grammatical elegance, read as follows: "Sir, we, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress, you are therefore hereby ordered to proceed with your military company immediately to Lingan with their arms and ammunition, and to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed."

Sir Wm. Ritchie, C.J., in concurring with a majority of the Court allowing an appeal from the Supreme Court of Nova Scotia, which had held that the order of the magistrates was irregular in not expressing on its face the actual occurrence of the riot, said, "I do not think it is necessary either that the justices should have a personal knowledge of the riot or of the anticipation thereof, or that they should hold a judicial investigation to determine its existence, to require which, in many cases, would practically render the law entirely abortive. It must be assumed that the justices believed, and had reason to believe that these representations were well founded. Could it ever have been contemplated by the Legislature that the officer to whom the order was transmitted was to obey or disobey as he might think it technically right, or the men to obey or disobey it if, in their opinion, the requisition was not strictly right, and in the meantime was the riot to go on and the civic force be overpowered while the commanding officer and his men were either disobeying the order or settling this knotty technical question?"

But while it is necessary that three magistrates must bring him out, he is to obey but one magistrate when actually in the field. The object of this enactment is obvious. But if there are several magistrates present on the scene, it will be

(*m*) 14 S. C. R. 8.

well for the officer to insist upon their deciding which of them is to give him his orders. "He shall obey such instructions as are lawfully given to him." Here comes in the risk to the soldier. An arraignment for manslaughter is not an agreeable prospect, but if the instructions to fire are not lawfully given and death ensues, then it would not be improbable that with the inflamed prejudice of the attacked faction, making them greedy for any revenge, an indictment would follow. No matter what an officer with his special training may consider the necessity for firing, yet he would incur great responsibility by firing without orders, or, on the other hand, refusing to fire in pursuance of his orders. The magistrate should have the opinion of the officer in military matters. If the magistrate is a man of discretion, intelligence and courage, and is content to act in concert with the officer, all would be well. But our magistrates are not always men having these good qualities. In view, therefore, of the danger, even if the occasion be rare, of acting upon illegal orders and unwise commands, Parliament would do well to consider whether the Act should not be amended so as to put the entire command in the hands of the officer. In his consideration he would probably bring to bear as much of the feelings of a citizen as the magistrate, and in him the final determination to fire upon his misguided fellow citizens would be attended with as much sorrow as would be felt by a civil official.

These remarks are the more applicable from the fact that in our Dominion the military force which would in most cases be called upon would be the ordinary militiaman, or citizen soldier, and not the regular force. Not that it should be implied that the regular soldier is less amply endowed with the more sympathetic qualities of man, but it can hardly be denied that his training must make him look upon extreme measures with less disfavour than his friend the volunteer. Following this theme, it cannot be denied also, that it is undesirable that our regular forces should take on the character of policemen or gendarmerie except as a last resource. Our people should be brought up with the idea that our regular forces (apart from their instructional value) are only for defence against a foreign foe. Tommy Atkins should be

popularized as much as possible if recruiting from the best classes of men is to be successful, and it is well known that nothing infuriates a mob so much as the appearance to oppose them of the regular soldier, and it is well known also that no mob springs into existence without the covert help and sympathy of large numbers of the community who secretly wish it a measure of success. How much this sympathy will be detached from the movement when it is realized that relatives and friends in the militia must move out from their homes to be execrated and assaulted, in comparison with the feeling of indifference which surrounds the movement of a solid body of troops, to whom such is the business of life, will be easily discernible. As the minimizing of sympathy with a mob means lessening the difficulty of suppression, it is argued, therefore, that it is the volunteer militiaman to whom work of this kind should be assigned.

It is labour difficulties that afford the most probable causes for the help of the soldier. The soldier is not, as a rule, persona grata with the workingman, and the eyes of labour are turned askance at the company of non-producers whose only "walking boss" is a sergeant-major. This should not be so, because only with the tranquility of a country can the labourer's lot be happy. But it is only when labourer joins hands with anarchist that he need mistrust the soldier, for, in that case, the soldier, regardless of sympathy or individual opinion, must be inexorably allied to the side of capital and do his duty, although the result may give regret which will last him a lifetime.

There has been some digression here from the main discussion as to the conduct of soldiers with the mob. When the actual collision takes place, then the soldier must bring to his assistance a commingling of common sense, patience and intrepidity. The dual responsibilities of the soldier here commence. He must obey orders, and in obeying them he may break the law. He must tread the exact line between excess and failure of duty. Obedience to the illegal orders of a superior officer affords no protection. Mr. Justice Willes once said, "I believe the better opinion to be that an officer, or a soldier acting under the orders of his superior, not being plainly illegal, is justified, but if they be plainly illegal he is

not justified" (*n*). Another authority says that the soldier "must act honestly upon what he deems not unreasonably to be the effect of the orders."

Sir Charles Napier said of the proposition that an order not plainly illegal does not justify—"If such is law the army must become a deliberative body, and ought to be comprised of attorneys, and the Lord Chancellor should be commander-in-chief." An American Judge says: "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the order of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be lost in wordy conflicts between the advocates of conflicting opinions" (*o*). The habit of discipline and obedience in a soldier is more essential to the well-being of the state than the possibility of his now and then executing an illegal order is injurious to it.

On the whole, then, it may be safe to declare the law to be that the inferior need not go behind the order of his superior to see if it is warranted, and if the order is not palpably illegal he is protected in obeying it. The soldier is not so well protected in Canada or Britain as in the country to the south of us, where his acts are almost unquestionable, but, as our empire is freer than that republic, soldiers will not grumble if greater safeguards have been raised against the taking of the lives of those who are often the victims of despair or fanaticism.

In assisting the quelling of civil disturbances, the soldier must be forbearing and patient, but he must know when to strike effectively if any wavering would be dangerous, and above all, he must be absolutely courageous, as small instances of valour and intrepidity have often been known to be more effective in overawing an untrained though powerful opponent than the actual display of force.

H. M. MOWAT.

(*n*) Keighly v. Ball, 4 F. & F. 763.
(*o*) McCall v. McDowell, 3 Cald. 85.

THE LAW OF LEGISLATIVE POWER IN CANADA.(a)

Mr. Lefroy's long promised book under the above title has at last been published, and it amply justifies the years of careful thought and preparation expended upon the work. It is impossible to fairly set forth the merits of the book in a review.

Mr. Lefroy is the first writer on the British North America Act to reduce the decisions to a series of propositions. The work is confined, as its title indicates, to the distribution of legislative power between the Dominion Parliament and the Provincial Legislatures; and it is somewhat astonishing to find that no less than sixty-eight propositions are enunciated. Perhaps some other writer might re-classify them, and append some to others as corollaries or sub-propositions; but, none the less, they require separate treatment.

We should have preferred an entirely different arrangement, viz., a division of the subject into different classes of jurisdiction, with the propositions ranged under the larger heads. For instance, the original theory of the relation of a colony to the Crown, with special reference to Canada; the removal from prerogative government to parliamentary; the establishment of representative and responsible government; the present relation to the British Parliament and Executive; the status of a colonial legislature, with special reference to the powers of the Dominion Parliament as to parliamentary law, and to those of the Provincial Legislatures, which seem, by the decision in Fielding v. Thomas, to be unlimited in their power to accord to themselves privileges, immunities and powers. It is worthy of note at this stage that the Par-

(a) By A. H. F. Lefroy, M.A. (Oxon.), of the Inner Temple, London and Osgoode Hall, Barrister-at-Law. Toronto: The Toronto Law Book and Publishing Co. 1897-8.

liament of Canada, as a subordinate legislature, possesses the unique power of erecting new Provinces in the North-West Territories and endowing them with constitutions, a power probably not possessed by any other subordinate political entity, and attributable only to supreme legislative bodies. Then follows the territorial limitation, or restriction common to artificial legislative bodies. Then the question of incidental or inferential jurisdiction, to enable the different legislative bodies fully to carry out all necessary legislation upon the topics specifically allotted to them, and, finally, the topical jurisdiction of each. To say this, however, is only to say that every one would not write a book in the same way.

The propositions are, some of them, of an entirely simple character; some of them more complex, while some we make bold to challenge as propositions at all. For instance, Proposition 29, "There is no power given by the Act to the Dominion Parliament to amend or repeal an Act passed by a Provincial Legislature within the limits of its authority; nor to the Legislatures to amend or repeal a valid Dominion Act." This might be better denominated as a truism. For, given the proposition that they are mutually exclusive, it is but another mode of asserting it. Regarded as a proposition, however, it must be taken with the very important qualification that in subjects of concurrent jurisdiction the Dominion can override though not repeal Provincial legislation. For instance, a Provincial insolvency law is subject to be entirely superseded by a Dominion one. While the terms "amend" and "repeal" would be out of place in stating the effect of a Dominion Insolvency Act, the result would be the same. We can quite appreciate the difficulty of formulating propositions such as these, and our remarks perhaps should only go to show how the different phases of the subject overrun and interlace each other.

The preceding proposition, that "with the exception of agriculture and immigration, there is no subject-matter over which there can (speaking strictly) be said to exist concurrent powers of legislation," is subject to the qualification that in matters relating to health, morals and the safety of

the subject—all of them subjects incidental to all governing bodies—there exist concurrent powers. No one doubts that a general law of the Dominion prohibiting or regulating a dangerous trade, such as the manufacture of poisons or explosives, would be valid as being a law for the peace, order and good government of Canada; nor could any one safely challenge a law of a particular Province regulating a particular trade peculiar to the locality, which was dangerous to the inhabitants.

Again, concurrent powers undoubtedly exist with regard to insolvency. A Provincial insolvency Act is good till overridden by a Dominion Act. It is difficult, perhaps, to maintain the proposition of concurrent powers absolutely, when one may override the other; but taken in the qualified sense in which it is always used in speaking of such subjects, viz., that either one has the originating power, it is true. Indeed, both legislatures enjoy only concurrent powers with the Imperial Parliament. The fact that the latter does not exercise its powers does not derogate from them in any way, nor make the Canadian legislatures' powers any less properly described as concurrent. And the same remark applies to the comparison of Dominion and Provincial powers.

This consideration brings us to the contemplation of another proposition, the 35th. "Subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures may, in another aspect and for another purpose fall within the jurisdiction of the Dominion Parliament." To take again the instance of an insolvency law. The Provincial Legislatures may deal with contracts, property, civil rights, and other process for recovering or enforcing them; and so may pass a law for the arrangement with creditors of a debtor's affairs. But the Dominion may deal with insolvency, which includes all these matters incidentally. The proposition, while quite true, does not in the least assist us, unfortunately, in the interpretation of the Act; for the difficulty that lawyers are always meeting with is just to see things in their proper light, or aspect. It did not in the least help to a decision of where lay the jurisdiction to deal with insolvency; nor does it help us to ascertain

in what aspect any subject may be dealt with by the Dominion Parliament, nor in what other aspect the same topic may be dealt with by a Provincial Legislature. The decisions on the right to license liquor sellers got into the most terrible confusion, and yet it was in one of such cases that this proposition was enunciated.

Again, though Mr. Lefroy does not bring the cases about to be mentioned under this proposition, it seems impliedly to embrace them, but only to breed confusion. We refer to Citizens v. Parsons and Tennant v. Union Bank. In the former it was held that a foreign insurance company coming into the Province of Ontario to do business was bound to make its contracts according to the local enactments. In the latter, it was held that a banking corporation was at liberty to bring the law of its domicil with it so far as warehouse receipts were concerned, which were contracts within the local jurisdiction. The former seems the better decision, and is in harmony with a decision of the Judicial Committee that a Scottish insurance company insuring a life in Australia had to pay the risk in Australia, and, of course, according to the local law. The latter decision, while of course binding, is objectionable, for the reason that all persons and corporations in Ontario (except banks) are under a local statute regulating warehouse receipts, which is undoubtedly valid as being a Provincial law. But banks incorporated by the Dominion bring with them a Dominion law peculiarly their own, entirely different from the local law. Why an insurance company incorporated by the Dominion must frame its contracts according to the law of the Province, while a banking corporation incorporated by the Dominion need not obey the Provincial law as to warehouse receipts, is not clear, except that it has been so decided. It may be, though Mr. Lefroy does not so contend, nor did the Privy Council assert when giving the decision, that this proposition covers the case, viz., that in one aspect the Provinces may legislate as to warehouse receipts, but in another aspect the Dominion may make a particular law therefor as applicable to banks. But this would introduce appalling confusion into the system. For the Dominion would thus authorize banks to evade the Registry Act and the Chattel Mortgage Act. Is

it, in truth, really a proposition? The "subject-matter" spoken of by Mr. Lefroy is not identical in each case. An insolvency law necessarily deals with property and civil rights, just as banking comprises another vast quantity of special property rights and contracts. Yet the subject-matter is not the same in either case as property and civil rights.

Again, we say the contemplation and comparison, the criticism, of these propositions only shows how extremely difficult it is to formulate any proposition that is not immediately to be hedged about with qualifications.

Mr. Lefroy's comparison of the constitution of Canada with that of the United States, and his verdict in favour of its likeness to the British constitution rather than to that of the United States, is ably done, Professor Dicey notwithstanding. The latter thinks our constitution more like the United States constitution than it is like that of the Empire, but we cannot agree. The constitution of the United States is written, fixed, rigid. The constitution of Canada is not all written. The mistake is to say that it is a written constitution. Part of it is—that affecting the distribution of executive and legislative power, but no more. We never spoke of the constitution of old Canada as a written one. The Legislature had power to make laws for the peace, order and good government of Canada, that was all, but the unwritten portion was identical with the constitution of the United Kingdom. Eliminate sections 91 and 92 from the British North America Act, and no one would speak of the rest of the Act as "the constitution of Canada." The Act is necessary only to give power to make laws, but the powers and practice of government depend upon tradition.

Nor is the distribution of legislative power like that of the United States in either its fundamental or interpretative senses. In the fundamental sense, Canada is not composed of political entities, having all legislative power not granted to the federation. It is a political entity itself, having complete governing powers, and is divided into districts or provinces for local legislation, whose topics are excepted from the general part.

The United States, on the other hand, is a true federation of sovereign states which have delegated to the central authority just what they pleased, and retain the rest. They did not even give a name to the federation. It has not a territorial existence, but is composed of, not divided into, sovereign states. We are quite aware that there is nothing new in this, but it is called forth by Mr. Lefroy's defence of the preamble of the British North America Act, as against Mr. Dicey's assertion that it is mendacious.

Mr. Lefroy's work is altogether an exceptional one—good in its conception and ably executed—ample in all its details, and a mine of information.

EDITORIAL REVIEW.

Personal Succession to Land.

We may expect some assistance from England in the interpretation of The Devolution of Estates Act, now that the same experiment is being tried by the Imperial Parliament.

The main features of the scheme appear in the Imperial Act, but there are essential differences which will preclude the raising of questions not altogether clear in our legislation. The Act in question, 60 & 61 Vict. c. 65, is for the establishment of a real representative. The clause which declares that land shall vest in the personal representative, excepts the case of land which might pass by survivorship. This is a precautionary qualification, for there is nothing elsewhere in the Act to indicate that estates in joint tenancy might be affected by it.

Then the land is to vest "as if it were a chattel real." It is not quite clear why this was inserted. If it vests, it vests, and that is the end of it. But if it were intended that, when vested, it should be treated as a chattel real, and become distributable as such, there would clearly be a motive for the use of the words. By the second section, sub-section 3, however, it is explicitly declared that, in the administration of the assets of a person dying after the commencement of the Act, his real estate shall be administered "in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate." This would indicate pretty clearly that the course of distribution of personalty would have to be followed in distributing land—if indeed that were the intention.

But in sub-section 4 of section 2 the heir-at-law appears. He is to have an equal right to letters of administration, if

he be not one of the next of kin, which is a very plain indication that land is not to be administered as personalty or as a chattel real, but is to go to the heir through the medium of the personal representative under the Act to establish him as a real representative. If the heir-at-law is to take as heretofore, why be so particular to declare that the land is to vest as a chattel real and be administered "with the same incidents as if it were personal estate?" And again in section 3 the personal representative is directed to convey to the heir. So it is clear that he is not to be done away with.

Section 2, sub-section 1, makes the personal representative "trustee for the persons by law beneficially entitled thereto." But the person entitled, in the case of an intestacy, may be the next of kin or the heir-at-law, according as the clause requiring distribution as personalty, or that enabling the heir to obtain a conveyance may be deemed the weightier.

No provision is made as to what will happen to an heir (assuming him to take as heir) liable on a covenant in case the personal representative sells the land to pay the general debts of the deceased.

Very shortly after our Act was passed it was found necessary to provide for this. Under the Imperial Act, is the heir-at-law, who takes by conveyance from the personal representative, to be any more liable on a covenant made by a man for himself and his heirs, than one of the next of kin, who takes under the administration from the personal representative, is for the simple contract debt of the deceased?

Is the liability to be of the same nature, viz., a liability to contribute to the debts to the extent of what he has received?

The same difficulties will arise as under our Act, in ascertaining who is the owner before letters of administration are taken out. And in the case of existing mortgages, where it becomes necessary to foreclose, or sell under a power exercisable upon notice to heirs, the mortgagee will find himself obstructed. Though he may perhaps apply to the Court for relief in a foreclosure action, he is quite unable to sell

under his power if it is operative only upon notice to heirs. See Parkinson v. Hanbury, L. R. 2 H. L. at p. 18.

Again, who is to protect the land from trespasses, waste, etc.? Must the estate wait for a personal representative to be appointed, and will his right relate back to the death?

And if a trespasser should be so fortunate as to maintain possession for twelve years, and then a personal representative should be appointed, would he not be barred under the Real Property Limitation Act, section 6, which may now acquire new significance.

It is a very remarkable thing, though perhaps provided against elsewhere, that the Act is not limited to estates in fee simple and for the life of another. Apparently it includes estates tail. If this is so the result would be very extraordinary.

In the case also of failure of heirs the lord of the fee may be deprived of the right of escheat, for a creditor taking administration would have a right to sell.

We shall be glad indeed to add to our experience, that which will ensue when the Act produces some of these questions for trial.

BOOK REVIEWS.

The Principles of the Law of Sedition, with an appendix giving the law in India, as it was and as amended. By J. CHAUDHURI, M.A. (Cal.) and B.A. (Oxon.), and of the Inner Temple, Esquire. Calcutta: Weekly Notes Printing Works. 1898.

This is a small volume containing a most interesting historical and analytical account of the Law of Sedition. Commencing with the law before the Libel Act, the learned author traces it through that enactment and the modern cases to the present time. He shows how it was originally unlawful to speak in terms of hatred, contempt and ill-will of the Sovereign or the Government, a state of the law which would put about one-half of the contributors to the party press in prison. That element has been so largely modified that there is hardly anything that does not fall within the limits allowed in speaking of either real or fancied grievances. We have here a very careful and logical analysis of the English law as exhibited in leading cases. In the appendix the law of India is discussed at length. Altogether this is a most interesting little book, and the more especially so as it is written by one of our fellow-subjects in India.

The Laws of Insurance: Fire, Life, Accident and Guarantee. Embodying cases in the English, Scotch, Irish, American and Canadian Courts. By JAMES BIGGS PORTER, of the Inner Temple and S. E. Circuit, Barrister-at-Law; holder of the first prizes (1873) in Equity and Real Property; assisted by WILLIAM FIELDEN CRAIES, M.A., and THOMAS SHEPHERD LITTLE, M.A. (Trin. Coll. Cam.), Whewell Scholar in International Law, of the Inner Temple, Barrister-at-Law. Third edition. London: Stevens & Haynes. 1898.

This very successful book has been enriched by the addition of about two hundred new cases. The citations from

Canadian cases are very numerous, and the book is therefore exceedingly useful to practitioners in this country. The mode of citing them is, however, peculiar—3 App. R. being referred to as 3 U. C. (App.). When will they discover in England that Upper Canada went out of existence in the year 1867 ?

The Principles of Equity, intended for the use of students and the profession. By EDMUND H. T. SNELL, of the Middle Temple, Esquire, Barrister-at-Law. Twelfth edition. By ARCHIBALD BROWN, M.A., Edin. and Oxon., and B.C.L., Oxon., of the Middle Temple, Esquire, Barrister-at-Law. London: Stevens & Haynes. 1898.

About every two years a new edition of this work appears, showing that it maintains its place of popularity and usefulness. A reference is made to the Land Transfer Act of 1897, by which the personal representative now becomes a trustee for those beneficially entitled, but there is no discussion of the effect of the Act.

The Dominion Law Index, embracing all the legislation of the Dominion Parliament; and such unrepealed provincial enactments and Imperial statutes, treaties and orders as bear a special relation to Canada (1867-1897). By HARRIS H. BLIGH, Q.C., librarian of the Supreme and Exchequer Courts of Canada, compiler of the Ontario Law Index, and WALTER TODD, Private Bills Department, House of Commons. Second edition. Toronto: Canada Law Journal Co. 1898.

No more need be said of this Index than that it includes all recent legislation, and will be found as useful as the first edition.

THE STUDENT'S DREAM.

I sat alone with Benjamin on Sales upon my knee,
The letters danced before me, and the words I couldn't see;
I'd attended all the lectures, and had taken note on note,
But I couldn't see a grain of sense in anything I wrote.

I was reading for my final, immersed in deepest gloom,
Oppressed with nervous doubt and dread of what might be my doom;
I was overcharged with Equity and Common Law and Torts,
And altogether I was feeling greatly out of sorts.

The books were piled around me in a litter on the floor;
There were Marsh's "Court of Chancery," and half-a-dozen more,
That beastly book on Titles, and that other one on Wills,
DeColyar, Pollock, Leake and Best, and poor old Byles on Bills.

And now a mist seemed gathering about me in the room,
And through it all the books in curious forms began to loom;
They perched in turn upon my knee, and flapped their leaves and fluttered,
And whirled in circles round my head, and ominously muttered.

They pulled my hair and boxed my ears and bumped against my nose,
And then they settled on the floor in front of me in rows,
And Blackstone hobbled forward with a question to propound,
"What is the rule in Shelley's case, and where can it be found?"

This seemed to be the signal for the ill-conditioned rabble,
For they poured forth questions right and left as fast as they could gabble,
"Does dower attach on land alone? If so, pray answer how
A man can say, 'With all my worldly goods I thee endow?'"

State reasons for all answers, and especially the next,
And where the lectures differ from your reading of the text.
"If A. kicks B., and B. kicks C., who, driven to distraction,
In turn kicks A., is this what's called circuity of action?"

"If A. sues C. for damages, can C., if he's a mind,
Buy up the kick B. got from A. and pay A. off in kind?
Or, if it's not assignable, can C. set up the plea
That though he gave the kick to A. 'twas to the use of B?"

"If either course you should adopt, will counter-claiming do,
Or does the law of set-off apply to a set-to?
In case you should not think so, but advise that C. sue A.,
Explain, as nearly as you can, what would you make C. pray?"

"Suppose your neighbour dines with you and guzzles too much port,
Are you, as neighbour, bound to give him lateral support?"
"If B. sues A., for that A. merely shook his fist at B.,
Is falsa demonstratio non nocet a good plea?"

"How is it that the ancient forms of writ did not out-live us,
For instance, writ of entry sur disseisin in the quibus?"
"Is a double possibility your chance of getting through?"
"And can you sue in trover for conversion of a Jew?"

"If attendance at the lectures is considered, as a rule,
To be equally important for the students and the school,
Why shouldn't the Committee make arrangements to have cabs sent,
For those who are habitually late, or who are absent?"

At last I got so angry at this senseless sort of joke,
That I aimed a kick—and nearly tumbled off my chair—and woke,
The fire was out, the lamp was low, and I was cold and weary,
The room was full of calf-bound ghosts that made me feel so eerie,

I let the books lie where they were and stumbled off to bed,
But, before I pressed the pillow with my throbbing, aching head,
I consulted a decanter, which I keep upon my table,
With "sumendum ter in die atque noctu" on the label.

THE
CANADIAN LAW TIMES.

JUNE, 1898.

ALLEN v. FLOOD.

L. R. (1898) A. C. 1.

"THE House of Lords has never deserved better of the Common Law."

Such was Sir F. Pollock's hurried comment upon the judgment in this case, which was delivered just as the January number of the Law Quarterly Review was going to press.

This case has received only meagre notice so far in Canadian law magazines; its far-reaching character will justify an extended discussion of its history and possible effect.

Known in its earlier stages (*a*) as Flood v. Jackson, it arose out of difficulties between the Shipwrights' Union and the Boiler Makers' Union, the latter union denying the right of members of the former to do iron work on ships, which the former claimed to be entitled to do.

Two shipwrights, Flood and Taylor, came to the employment of the Glengall Iron Company and were working on piece-work on a vessel being built by that company. Employment of all workmen for the company was day by day.

Amongst their fellow workmen were many members of the Boiler Makers' Union, and these were incensed with Flood and Taylor because, being shipwrights, they had shortly before done iron work for former employers.

One Allen, a "walking delegate" of the Boiler Makers' Union, was sent for, saw the manager of the company, told

(*a*) (1895) 2 Q. B. 81.

him the men were aggrieved at having to work with Flood and Taylor, and that if these men were continued on the job, the others would leave off work, or be called out.

In consequence of the intervention of Allen the plaintiffs were at once discharged. Flood and Taylor thereupon brought an action against Allen and the officers of the Boiler Makers' Union, but it was shown that the officers had not authorized Allen to act as he did, and as against them the action was dismissed.

Kennedy, J., before whom the action was tried in February, 1895, left two questions to the jury: (1) Did Allen maliciously induce the company to discharge the plaintiffs? (2) Did Allen maliciously induce the company not to employ the plaintiffs? The jury replied to both in the affirmative, and judgment with £40 damages was given for the plaintiffs; this judgment was affirmed by a unanimous judgment of the Court of Appeal in the following March.

An appeal from this judgment was heard before the House of Lords (the Lord Chancellor, and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey), but as they were divided in opinion, the appeal was re-heard in March, 1897, before a House strengthened by the addition of the Lord Chancellor of Ireland and Lord James of Hereford.

To give greater weight to the occasion, the Lords summoned to their assistance, in order to advise them as to the law applicable, eight of Her Majesty's Judges, a course which has not been adopted since the important case of Dalton v. Angus, A.D. 1881. These Judges attended and sat in state to hear the argument, and afterwards, by a majority of 6 to 2, advised that the appeal should be dismissed.

Notwithstanding this result, in December, 1897, judgment was given by their Lordships, upholding (by a majority of six to three) the views of the two dissenting Judges, and allowing the appeal.

No better illustration of the glorious uncertainty of law can be found than the result in this case.

In the days when it was not infrequent for the Lords to summon the Judges to their assistance, the Lords did not always adopt the views of the majority of the Judges, but

probably no precedent exists in which their Lordships have overruled such a preponderance of judicial opinion and decision as existed in the present appeal. Four Judges below had unanimously been in favour of the respondents (the workmen), six of the assessor Judges agreed with them, as also did the three dissenting Lords (Lords Halsbury, C., Ashbourne, C., and Morris)—thirteen in all. On the other side were two of the assessors and six of the law lords—the opinion of 13 overruled by that of 8.

But, notwithstanding the numerical disproportion, the verdict of the profession generally seems to be in favour of the judgment, as affirming well settled principles of common law, and repressing the somewhat dangerous tendency of late years to introduce questions of intention and motive as an element in holding acts not illegal in themselves to be yet civil wrongs for which damages may be recovered.

The point actually decided was a narrow one, namely, that (apart from conspiracy) it is not actionable to procure a third person to refuse to contract with a plaintiff, even though the defendant thereby injures, and has acted for the purpose of injuring the plaintiff. But the various opinions expressed on the subject of malice, and the doubts apparently cast upon cases of some antiquity, seem to show that the decision is of very far-reaching importance, and that some doctrines heretofore considered as well settled, may be open to grave doubt.

A reference to the course of decision may be interesting, without however going back to the familiar case of the decoy duck (*b*), which met with but scant courtesy at the hands of some of the learned lords.

The well known case of Lumley v. Gye (*c*), which was based on and extended the almost obsolete action for the enticing away of another's servant, had established the doctrine that the knowingly procuring of a breach of contract for personal services, was an actionable wrong not confined to cases where the relationship of master and servant strictly so-called existed.

(*b*) Keeble v. Hickeringill, 11 Mod. 74. 131.
(*c*) 2 E. & B. 216.

In Bowen v. Hall (*d*) this decision was approved, and was even extended to contracts other than for personal services.

In Bowen v. Hall (*e*) the Judges who were in the majority, apparently misinterpreting the language used in Lumley v. Gye (*f*), introduced the element of a malicious motive as a substantive cause of action in itself, and used words suggesting that the presence of injurious intent in the mind of the procurer would give a good cause of action, though the act procured is in itself lawful.

In Temperton v. Russell (*g*) a long step in advance was taken, that case holding that not only will an action lie for maliciously procuring a breach of a contract, but also for maliciously preventing the formation of a contract, if damage follows; and that whether the contract be between master and servant or not is immaterial.

These are all cases of interference with contracts actually in existence, but in Allen v. Flood (as already pointed out) the employment was by the day, the workmen (the plaintiffs) could be discharged at the end of any day, and their dismissal involved no breach of contract, or unlawful act, nor would the strike of the boiler makers have involved a breach of contract as their employment also was by the day. It was necessary therefore to the success of the plaintiffs to induce the Court to extend still further the principles laid down by previous cases, and to obtain a decision that where it is actionable to procure the breach of a contract of employment, it is equally actionable to procure the employer not to continue or renew it.

Two important cases, not (it is true) cases of interference with contract, but enunciating principles bearing directly upon the question in Allen v. Flood, must not be overlooked.

In Mogul Steamship Co. v. McGregor (*h*), the defendants were a combination of steamship companies trading with ports in China. The plaintiffs traded independently to the same ports, and had been refused admission to the combina-

(*d*) 6 Q. B. D. 333.
(*e*) 6 Q. B. D. 333.
(*f*) 2 El. & B. 216.
(*g*) (1893) 1 Q. B. 715.
(*h*) L. R. (1892) A. C. 25.

tion, or, as it was called, "conference," of the defendants. The defendants, by underbidding the plaintiffs, by cutting rates, and bringing pressure to bear upon shippers, so as to prevent business being given to the plaintiffs, endeavoured to drive the plaintiffs out of the trade.

They brought an action to restrain these acts and for damages. But the House of Lords held that the acts of the defendants were all within the limits of allowable trade competition, that they were all lawful acts, not in themselves wrongful, and that the plaintiffs had no cause of action.

The case of Corporation of Bradford v. Pickles (*i*) was an action to restrain the defendant, a landowner, from sinking shafts and driving levels through his own land, for the professed purpose of draining the strata with a view to working minerals therein. The effect was to discolour the water in springs fed by waters percolating underground, and it was apparent that, if persevered in, the operations of the defendant would result in a considerable and permanent diminution of the supply of water to these springs, upon which the plaintiffs largely relied for a supply of water for the use of the inhabitants of Bradford.

It was contended that the real object of the defendant was to force the corporation to buy him out at a price satisfactory to himself. It was held by the House of Lords that even if this were true, even though the motive of the defendant was not to benefit himself, but to injure his neighbour, the plaintiff could not be interfered with.

Lord Watson said: "No use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." Lord Macnaghten said: "It is the act, not the motive for the act, that must be regarded; if the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."

These two cases were considered by the learned law lords who were in the majority to have a distinct bearing upon the

(*i*) L. R. (1895) A. C. 587.

point in Allen v. Flood, but were distinguished by Kennedy, J., and Court of Appeal, on the ground of the absence of malice in the Mogul case, and the fact that the Bradford case was one of the user of the defendant's own property, and did not affect the disturbance of the plaintiffs in any right or liberty of theirs. These Courts, following Temperton v. Russell, held that it is immaterial that the act induced is not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff or to benefit the defendant at the expense of the plaintiff is present.

This was the principle of Bowen v. Hall, where it had been laid down as follows: "Merely to persuade a person to break his contract may not be wrongful in law or fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an objectionable act if injury ensues from it (*j*).

In other words, the liability in such cases depended on the motive, and where a desire to injure another existed, that was a malicious motive—and a liability arose. This doctrine is distinctly overruled in Allen v. Flood, which holds that bad or malicious motives do not render a person liable for an act which would otherwise be lawful; that the external character of the act, and not its motive, has to be looked at, and that where no legal right had been violated, the existence of a bad motive can not give a cause of action.

Lord Watson says: "Although the rule may be otherwise in regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstances that the act done constitutes a violation of the law."

(*j*) Judgment of Brett, L.J., at p. 338.

Lord Herschell says: "It is certainly a general rule of our law that an act prima facie lawful is not unlawful and actionable on account of the motives which dictated it."

The result of the decision has been thus summarized by a writer in the Harvard Law Review:

"An act which is not in itself unlawful apart from the motive of the party doing it, as falling within some of the ancient and tolerably well defined classes of wrongful acts, cannot render a man liable to an action at law, however bad the motives on which he may have acted, and however serious the loss he may succeed in inflicting upon others. The rule which admits of some acts being considered tortious on account of the bad motive accompanying them is altogether denied."

The decision is no doubt satisfactory to those who deprecate the increasing tendency of judicial decisions to infringe upon ancient rules of the common law, but one cannot help regretting the result as permitting and legalizing gross interference with the rights of others.

There is much to be said in favour of the principle laid down by the Lord Chancellor as to the "right of the plaintiffs to pursue their calling unmolested." "I think the right to employ their labour as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong."

While this case does not in any way deal directly with the rights of trades unions, or the law of conspiracy and combinations, yet indirectly there is much bearing on all of these points, and already one of the numerous scholia, which we must expect, has appeared.

It must be noticed that several of the learned lords carefully disclaim dealing with the question of conspiracy, and decide the case solely on the question of malice.

Lord Herschell says: "I put aside the case of conspiracy which is anomalous in more than one respect." Lord Macnaghten says: "The decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly

known by the name of "boycotting," and other examples of oppressive combination, seems to depend on considerations which are, I think, in the present case conspicuously absent." And Lord Shand says: "The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind."

The case of Huttley v. Simmons (*k*) had been tried before Darling, J., with a jury in November, 1897. The plaintiff, a cab driver, sued the defendant Simmons, who was the president of a strike committee of a trade union, and others, who were the members of the same trade union, for damages sustained by the plaintiff in consequence of the defendants having induced a cab proprietor named Young to refuse to engage the plaintiff to drive a cab for him, or to let a cab to the plaintiff to be so driven.

In answer to questions left to them, the jury found that Simmons induced Young to refuse to engage the plaintiff to drive a cab for him, or to let a cab to him to be so driven. That Simmons did so in order to injure the plaintiff, not indeed to procure any advantage for himself, but for others for whom he was acting, and that Simmons conspired with others, to induce Young not to employ the plaintiff, nor to permit him to hire and drive a cab. Upon these findings the learned Judge dismissed the action as against the defendants other than Simmons (as to whom he had directed the jury that there was no evidence), and reserved judgment as to Simmons until after the decision in Allen v. Flood.

On the 18th December last he gave judgment dismissing the action with costs.

The facts of the case were similar to those in Allen v. Flood, no existing contract being broken, and no unlawful means used to prevent Young from employing the plaintiff. The only point of distinction was the finding of conspiracy, the presence of malicious preconcert.

Lord Shand, in his judgment in Allen v. Flood, had used these words: "Combination of different persons in pursuit of a legitimate trade object occurred in the case of The Mogul Steamship Co., and was there held to be lawful. Combina-

(*k*) (1898) 1 Q. B. 181.

tion for no such object, but in pursuit really of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful, but this case raises no such question."

Darling, J., however, treated this as merely obiter dictum, and came to the opinion, which he thought was "concluded by the very learned and altogether admirable judgment of Palles, C.B., in Kearney v. Lloyd" (*l*), that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff, and that accordingly none of the acts done or agreed to be done by Simmons gave the plaintiff any right of action for injury in law to any legal right of his.

In the case of Kearney v. Lloyd, the Chief Baron said: "If anything is well settled in law it is that in cases of this description, in which the old writ of conspiracy did not lie, the gist of the action is not the conspiracy itself, but the wrongful acts done in pursuance of it. The cause of action must exist, although the allegation of conspiracy be struck out; and the acquittal of all the defendants but one will not, as it would were the conspiracy a material part of the cause of action, prevent judgment against the remaining defendant if found guilty."

In the case of Mogul v. McGregor, there was what Mr. Justice Holmes has described as "combination of the most flagrant and dominant kind, and a combination which was essential to the success of the undertaking," but as the acts done were not in themselves wrongful, the wrong of conspiracy was held not to exist.

These cases would seem to show that the supposed rule established by Gregory v. Duke of Brunswick (*m*) that conspiracy may be material as being evidence of malice as forming a ground of action is no longer law, and that conspiracy, unless followed by some act in itself wrongful, gives no ground of action.

(*l*) 26 L. R. Ir. 268.
(*m*) 6 M. & Gr. 953.

This rule seems well settled also in the American Courts. The recent case, however, of Hopkins v. Oxley Stave Co. (*n*), affirms the proposition that in some circumstances concerted action may amount to conspiracy, and may be enjoined.

Are Lumley v. Gye and Bowen v. Hall still law ?

For the present, the answer must be given in the affirmative. Temperton v. Russell is spoken of as being on a different plane from the two former cases. Lord Herschell, in speaking of the advance made by the latter case upon the doctrines of the two former ones, says: "So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this: that in the one case the act procured was the violation of a legal right for which the person doing the act which injured the plaintiff could be sued, as well as the person who procured it; whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered; he would not be liable in respect of the act done, while the person who induced him to do the act would be liable to an action. I think this was an entirely new departure. A study of the case of Lumley v. Gye has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action." Lord Macnaghten says: "The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point."

Lord Shand reserves his opinion in regard to this, thinking the question worthy of full discussion and consideration.

Lord Watson, in discussing Lumley v. Gye, says: "There are in my opinion two grounds only upon which a person

(*n*) 83 Fed. 912.

who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and, for his own ends, induces that other person to commit an actionable wrong. In the second place, where the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and in that case, according to the law laid down by the majority in Lumley v. Gye, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

He also quotes from the judgment of Erle, J., in the case of Lumley v. Gye, "the learned Judge went on to say in language which I have already referred to: 'It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong.'" As to this Lord Watson says: "These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act, which, but for his persuasion, would or might never have been committed, is rightly held responsible for the wrong which he procured."

In none of the judgments, unless perhaps it be in the cautious words of Lord Shand, is the decision in Lumley v. Gye, as expanded by Bowen v. Hall questioned. But, on the other hand, it seems difficult to support these judgments if the element of malice is removed. Merely to persuade a person to break his contract, may not be wrongful in law or fact; in some cases it may be legitimate or even praiseworthy to do so. The element of a wrongful motive must be introduced in some form or other. The case suggested by Sir F. Pollock in his book on Torts of the brother who persuades and procures his sister to break off her engagement by reason of weighty and valid objections to the man to whom she is engaged, is a simple illustration. The breaking the promise is no doubt wrong. "A breach of contract is in itself a legal wrong" (per Lord Herschell), but in such a case is the brother to be held liable in an action for damages, when what

he has done is in the highest degree proper? The words of Lord Herschell, "he who wilfully induces another to do an unlawful act, which, but for his persuasion, would or might never have been committed, is rightly held responsible for the wrong which he procured," can hardly apply so as to make the brother liable. Some element of motive would seem necessary, and the test applied in Bowen v. Hall, "if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, . . . it is an actionable act if injury ensues from it," would seem a convenient test.

The words of Lord Shand seem very reasonable as to such a case: "If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration."

The decision in Allen v. Flood would seem to leave untouched the decision in Lyons v. Wilkins (*o*), where the pickets of a trade union, by the direction of the officers of the union, watched and beset the works of the plaintiff for the purpose of persuading workmen to abstain from working for the plaintiffs; the Court of Appeal (affirming the decision of North, J.), held that these were illegal acts and granted an injunction to prevent them.

Such a case would, in the language of Lord Macnaghten, be one of "oppressive combination," and entirely outside of the scope of Allen v. Flood.

The result since Allen v. Flood may perhaps be summarized as follows:

1. The enticement of a servant still remains an actionable wrong as before.

2. One who, knowingly and for his own ends, procures another to break a contract, is liable to an action for damages.

3. This rules applies to any contract, and not merely to contracts for personal services.

(*o*) L. R. (1896) 1 Chy. 811.

4. Where the act procured is not wrongful on the part of the immediate actor, but is to the detriment of a third party, the procurer may be liable if he has procured his object by the use of illegal means directed against that third party, such as fraud, slander, or duress.

5. The existence of a bad motive, where the act in respect of which the action is brought is not in itself illegal, does not give rise to an action for damages.

6. It is not illegal to induce another, by means not in itself unlawful, not to enter into a contract with a third party, even though damage thereby accrues to the third party, and though the inducer was actuated by malice towards the third party.

7. A conspiracy to do or cause to be done an act not in itself unlawful is not even evidence of malice, though the result may be injury to the person against whom the act is aimed.

8. A conspiracy to do certain acts gives a right of action only where the acts agreed to be done and in fact done, would, had they been done without preconcert, and by an individual, have involved a civil injury to the plaintiff.

9. The cases of Lumley v. Gye and Bowen v. Hall would seem open to question should they at any time reach discussion in the House of Lords.

10. Where any form of oppressive combination or terrorism is involved in the conspiracy, there would seem to be an actionable wrong.

Allen v. Flood has received its first notice in Canadian reports in Perrault v. Gauthier, 28 S. C. R. 241, issued since this article was in type.

N. W. HOYLES.

EDITORIAL REVIEW.

The late Mr. McCarthy, Q.C.

The sudden death of Mr. D'Alton McCarthy, Q.C., M.P., removes from amongst us one of the most remarkable of Canadians. At the Bar, in Parliament, and in social life, he was one of the most prominent figures, and one that will be greatly missed.

His characteristics of unexampled courage, independence and adaptability to circumstances were evident in everything he undertook. No other man at our Bar accommodated himself so readily to the requirements of a case as Mr. McCarthy. No matter how complex the facts, how obscure the law, nor how sudden the changes for better or worse in the course of a case, he never seemed to be unprepared; and indeed in a losing case his courage seemed to rise and his resources to multiply as obstacles increased.

In political life, his independence and belief in his own remarkable powers rendered him unfit to be merely a party man, and the inability to be a mere party man, while it forever precluded him from becoming a leader, rendered him, on that very account, one of the most distinguished members of the House of Commons.

Conveyance by Married Woman as Trustee.

The very wide words of the Married Woman's Property Act, it seems, do not apply to the case of a married woman who is a trustee. In Re Harkness & Allsopp's Contract, L. R. (1896) 2 Ch. 358, the matter came before North, J. A married woman, with others, held land in trust for sale, and, having made a sale, the purchaser required the concurrence of the husband in the conveyance. North, J., held that he

should join. His Lordship pointed out that the object of the Act was to enable a married woman to acquire, hold and dispose of real property "without the intervention of a trustee"; and it is only her own property that could be so acquired. "A married woman's property is to be 'her separate property'—separate, that is, from the only person who could before interfere with the possession of it, namely, her husband. It is to be separate from him without the intervention of a trustee. To speak of a married woman's property as her separate property is quite intelligible if it is her own property; but to talk of a married woman's separate property when she is a trustee of the property perhaps for another married woman, whose separate property it may also be, is not a very natural use of the term, and is not in my opinion the sense in which the words are used in the Act." This is emphasized by a subsequent clause of the Act which enables a married woman who is executrix or administratrix of the estate of a deceased person to assign stocks, funds, etc. The ability to transfer personalty thus conferred indicated, according to his Lordship, that realty held in trust was not to be conveyed as if the married woman were sole.

Unfortunately, the clause (sec. 24; sec. 2 of R. S. O. c. 163) defining "contract" as the "acceptance of any trust" is narrowed down by the remainder of the section, which protects the husband from liability for breach of trust.

The purpose of that section apparently is not so much to define the meaning of the word "contract" and so make the Act extend to all cases in which a married woman may contract, as to relieve the husband from liability in cases in which the wife may have been guilty of a breach of trust.

The result is very curious. Property of which a married woman is trustee, and with which her husband never could have anything to do, is under his protection, or liable to his interference, according to the way it may be regarded. The wife is therefore not wholly responsible, for she may be unable to perform her trust owing to the husband's refusal to join in her conveyance, a refusal which may be perfectly unreasonable. And the husband having undertaken nothing is surely not responsible.

It is quite possible that a married executrix or administratrix might have been able under our legislation to convey lands which devolve upon her as such, but, unfortunately, other legislation is against it. The Trustees and Executors Act, R. S. O. c. 129, s. 8, authorizes a married woman who is a bare trustee to convey alone, and the conclusion is irresistible that where she is not a bare trustee she must procure the concurrence of her husband.

Again, the Act respecting the conveyance of real estate by married women enables a married woman to convey "her" real estate free from her husband. Evidently this refers to what is her own, and not what she holds in trust. And by contrast with the clause cited from the Trustee Act enabling a married woman who is a bare trustee to convey alone, there seems but one conclusion to arrive at. Here is room for a most beneficial amendment.

The question was attempted to be raised in another case of Re Brooke & Fremlin, 14 Times L. R. 324, where a married woman, who was a mortgagee in her own right, was conveying the legal estate, and the concurrence of her husband was sought by the purchaser on the authority of Re Harkness. Kekewich, J., however, held that his concurrence was not necessary, as the mortgage was the wife's separate property.

This case is useful, also, as reiterating what is so often said and so carelessly ignored, that a mortgagee is not a trustee. "A mortgagee is not a trustee of the mortgaged property for the mortgagor until the mortgagee has been paid his principal, interest and costs, and then, being denuded of any beneficial interest, he becomes a bare trustee for the mortgagor. Until then the mortgagee holds the mortgaged property and estate for his own benefit only to secure to him his principal, interest and costs, and subject to redemption on payment." The result was that the married woman, not being a trustee, could convey without her husband's concurrence. And, at any rate, a mortgagee being a bare trustee after payment, if a married woman, can convey alone under the Trustee Act.

Condition for Rescission—Conveyance.

The common condition, that a vendor may rescind the contract if the purchaser makes any objection which the vendor is unable or unwilling to remove, received a very liberal interpretation in Re Deighton & Harris' Contract, L. R. (1898) 1 Ch. 458, where the Court of Appeal, reversing the judgment of Kekewich, J., held that because the purchaser insisted upon the concurrence of an official receiver in the conveyance the vendor was at liberty to rescind.

It had been theretofore determined that the condition was not a proper one to be enforced, where the requisition was made with respect to the conveyance. In Hardman v. Child, L. R. 28 Ch. D. 712, the condition was as follows: "If any objection or requisition, either as to the title or abstract or evidence of title, particular, conditions, quantity of estate or interest, conveyance, or otherwise, shall be insisted on, and the vendors be unable or unwilling to remove or comply therewith, they shall be at liberty . . . to annul the sale, etc." The purchaser drafted a conveyance, and the vendors added to it some words which imposed an obligation on the purchaser, of which he had had no notice previously, to repair a wall. The purchaser objected and insisted on the words being left out, and the vendors gave notice of rescission. Pearson, J., said during the argument, "I never saw the word 'conveyance' in a condition of this kind before." His Lordship was then referred to a conveyancing precedent. But, in giving judgment, he said, "If the obligation to repair the wall did run with the land it would bind the purchaser, whether there was any reference to it in the conveyance to him or not. If it did not run with the land the vendors had no right to insert any words in the conveyance imposing the obligation on the purchaser. . . . In my opinion the vendors were not entitled to rescind. I regret exceedingly to hear that it is now a common practice to insert a condition providing that if the purchaser shall insist on any objection or requisition as to the conveyance which the vendor shall be unable or unwilling to remove or comply with, the vendor shall be at liberty to rescind the contract

for sale. Only one case occurs to me in which it would be proper to insert such a condition. If the sale were made by trustees the purchaser might require that the persons beneficially interested in the property should be made parties to the conveyance to him, and I can conceive it possible that the vendors might not be able to procure their concurrence. . . . But even in such a case as that the conditions of sale, if they were properly drawn, would provide that the purchaser should be satisfied with a conveyance from the trustees."

In Re Deighton & Harris' Contract, the condition was as follows: "If any objection or requisition whatsoever shall be made by either purchaser as to the title, particulars, conditions, or any other matter or thing relating to or incidental to the sale, which the vendor is unable or unwilling to comply with, the vendor . . . shall have full power to annul the sale, etc." The property was leasehold.

One of the alleged defects was that a legal estate in a subdemise under which the vendor claimed had been outstanding in one Barker, who became bankrupt, and was therefore vested in the official receiver. The purchaser required the concurrence of the receiver in the conveyance, and on his insisting upon it, the vendor rescinded. Kekewich, J., held that he was not entitled to rescind. The Court of Appeal, however, reversed this judgment. Lindley, M.R., said, "Why is he not entitled to rescind under the very wide condition I have read? It is true that the condition does not in terms refer to an objection as to 'conveyance,' but any such objection as that is got rid of by the words 'or any other matter or thing relating or incidental to the sale.' The conveyance is perhaps one of the most important of the incidents of the sale. That is the vendor's case; and it seems to me that he is only exercising the right given to him by the sixth condition when fairly read and fairly applied."

This decision is unfortunate, if we may say so, with great respect for the Court of Appeal, and we make bold to express the doubt of its soundness. In Bowman v. Hyland, 8 Ch. D. 588, the condition was held to apply where the vendor had absolutely no title. The case in hand was distinguished on

the ground that the vendor had some title. But the distinction, besides being extremely thin, is, we think, not the true one. If the vendor cannot or will not convey all the legal and equitable estate in the land he utterly fails to carry out his contract. He puts himself in the same position as if he had no title at all, because he will convey no title at all unless the purchaser will take something less than he contracted for. The purchaser may well assume, on accepting the title, that the vendor will procure all necessary concurrences, and that he has power to do so. And the question, therefore, comes down to the narrow one, can the vendor refuse to convey what he has agreed to convey? If he cannot rescind when he has no title, a *fortiori* he ought not be able to rescind when he refuses to convey or to procure the necessary concurrences. The matter is, as the Master of the Rolls says, the most important of the incidents of the sale. It is the very essence of the sale. And the condition, when applied to the conveyance, simply amounts to this, that the vendor says, "Though I have agreed to sell to you and convey to you, yet if you insist on my conveying to you, and I am unable or unwilling to convey to you, I am not going to convey to you, but will rescind." It would shorten the condition and simplify matters a good deal, if it were made a condition that "if the vendor is unable or unwilling to carry out his contract, the contract shall be void."

It may be urged that that is the result when there is an objection to title which the vendor is unable to satisfy, but that is not true. Many a title is good, but the vendor is unable to give that strict proof which the purchaser is entitled to require; or it may be so expensive to do so that he may be unwilling to incur the expense. He may have, and often has, ability to convey. But where the only question is as to the proper form of the conveyance, or, to go deeper, as to the ability of the vendor to convey, then it goes to the very gist and essence of the contract, and is in fact no contract at all unless the vendor chooses that it shall be.

We should prefer very much to see the decisions of Kekewich, J., and Pearson, J., restored.

Mortgage: Future advances: Subsequent incumbrances.

The doctrine of Hopkinson v. Rolt, 9 H. L. C. 514, has received a qualification in West v. Williams, L. R. (1898) 1 Ch. 488, where it was decided that if the first mortgagee is under an obligation to make the future advances the subsequent mortgagee does not take priority over them.

In Pierce v. Canada Perm. L. & S. Co., 24 Ont. R. 426; 25 Ont. R. 426; 23 App. R. 516, the doctrine was held not to apply in this Province on account of the Registry Act. It is rarely the case that a mortgagee will oblige himself to advance money, but if the circumstances should arise there will be an additional reason for protecting the first mortgagee.

Poisoning by Arsenic.

Recent developments have made it quite apparent that restrictions should be placed upon the use of arsenic in preparing for burial deceased persons.

In Regina v. Sternaman, where the charge was murder by the administration of arsenic, the defence, on the question of fact, rested largely upon the theory that an arsenical compound had been, or might have been, used by the undertaker in preparing the body for burial. The evidence established that a large quantity of arsenic was found in the stomach and other organs of the deceased person—more than enough to have caused death if administered in his lifetime. It is said that arsenic is "temporarily deposited in the organs after absorption, but it is rapidly eliminated by the urine; and in from two to three weeks, if the person survives, the whole of that which has been absorbed may be removed from the body": Taylor, Med. Jur. 12th Am. Ed. 128. And in some cases it has been observed that the process of elimination has commenced almost immediately after the administration of the poison. Granted then that the system will eliminate the poison if the dose is not large enough to cause death, it follows that where a quantity is found in the stomach of a deceased person large enough to have caused death, its presence is due to comparatively recent administration, and not to an accumulation of small doses. Therefore, where a large dose has been administered, its discovery

in the system is an easy matter, and is apparently not rendered very difficult by lapse of time, as one of the properties of arsenic is to prevent decay to some extent.

Even where there has been a succession of small doses, no one of them sufficient alone to have caused death, the poison can be detected in the body, though detection is then more difficult. A large quantity found in the stomach or bowels indicates a large dose; but the finding of a small quantity does not prove that the dose was small: Taylor, p. 139. The detection of arsenic then is easy, and the presence of any of the poison in the body should call at once for further enquiry.

The presence of arsenic in the stomach and other organs, however, does not conclusively prove that it was administered internally. External application of the poison will in some cases cause death. And the peculiarity of external application is that in such cases the arsenic has been found in the stomach and kidneys: Taylor, p. 129; Wharton & Stil. Bk. V. § 414. Whether it is due to a property of the arsenic, or simply to the action of the organs, once the poison penetrates the skin, it seems certain that in the stomach arsenic will be found if the poison has been administered, internally or externally, in sufficient quantities to cause death.

But in the case in question, the evidence went further, and it was said by an expert witness for the Crown, that if a solution of arsenic were applied to a dead body the result would be that the body would take up the solution by absorption, which might spread through the body, and its presence would then be detected in the organs. This prepared the way for the defence. For, whatever may be the actual fact as to the use of an arsenical preparation by the undertaker, the doubt whether he had employed it, particularly when due to his own imperfect recollection of the circumstances, was enough to suggest uncertainty as to whether the poison found in the body was the result of administration before death, or the result of treatment of the body for burial.

Bearing these facts in mind, we are confronted with a serious danger to society, as long as the unrestricted use of

arsenic by undertakers is permitted. It is not an uncommon practice for undertakers to inject into the stomach or intestines an arsenical preparation to arrest the process of decay. Such a practice absolutely precludes the possibility of detection after death if death results from arsenical poisoning. Given the very strongest evidence of the deceased person's having exhibited symptoms of arsenical poisoning in an illness immediately preceding death, and given the fact that an undertaker has injected an arsenical compound after death and before an autopsy could be performed, and no conviction could possibly be obtained. In fact, under such circumstances it would be idle to lay a charge. Indeed, the very existence of the practice itself may baffle the administration of justice, though the undertaker may in fact never have used the poison. For, granted that the practice is a common one, the next step is that an undertaker may relapse into forgetfulness of the various cases which he has had to deal with. And once he shows any uncertainty in his recollection, or has to rely on entries of charges made for the process to refresh his recollection, so much the better for the defence.

Again, the fact being that a body will absorb arsenic after death, any application of arsenic, even the laying of a cloth soaked in an arsenical preparation upon the body, may in the mind of a jury account for the presence of arsenic in the body; or at any rate may raise such a doubt that, if the question depended upon a post mortem examination, no jury could with certainty say that a conviction was proper.

Under such circumstances there is an imperative demand for some regulations as to the use of such compounds in preparing for burial, if not for their absolute prohibition. We unfortunately cannot proceed upon the hypothesis that poisonings are infrequent. They might be if detection were easy. And detection of arsenic being easy, the fear of detection acts as a preventive. But make the dectection impossible, or even improbable, by the use of arsenical compounds after death, and, the fear of detection gone, the safety of society is at once jeopardized. A modern writer says, "At the present moment it would seem that, if once

the undertaker is allowed to enter the house, there is no chance of conviction, in arsenic poisoning. This means that arsenic, instead of being the most dangerous, is now, practically, the safest agent for committing murder. And also, that unless the attending physician is clever enough to properly diagnose the case during life, and is courageous enough to risk his own professional career by calling in the authorities and insisting on an autopsy at once, there is practically no hope of conviction." Hamilton, Leg. Med. 386.

Supreme Court Practice.

On Saturday, 14th May, there remained six cases upon the Quebec list to be argued in the Supreme Court. Counsel in Toronto, who were engaged in Ontario cases, concluded that the Quebec list would not be finished until the next following Saturday, and made arrangements accordingly.

On Monday, 16th May, however, about 4 o'clock, it was learned in Toronto that the Ontario list was to be taken up next morning. It was then too late to communicate with a gentleman then at Chatham engaged in case No. 2 on the docket, in sufficient time to enable him to catch the afternoon train, which leaves Chatham at 2.38 p.m., but he was ready to go to Ottawa by the first train that left Chatham. On Tuesday accordingly the Ontario list was taken up. Two motions were quickly disposed of and the first case was called. Counsel said that he was not prepared: that if they forced him to argue the case he would go on, but he expressed great unwillingness to do so. After a little unpleasant experience with the Court, they took up case No. 3, and that case was finished in the afternoon. Case No. 2 was mentioned on Tuesday, but Counsel for the respondent did not ask to go on. On Tuesday, at 2 o'clock, a telegram was sent from Ottawa that case No. 3 would be taken up on Wednesday, and that the Counsel present were pressing it to go on. The counsel engaged could not by any possibility get to Ottawa in time, but several other counsel were present in Ottawa and ready

to proceed with other cases, and one gentleman went from Toronto specially to be ready in another case and keep business going.

On Wednesday, after case No. 1 was called, case No. 2 was called. Two gentlemen present had seen the respondent's counsel, and had explained the position. When case No. 2 was called the respondent's counsel rose and said he was ready to go on. The position was explained to the Court by a gentleman present who offered to pay the respondent the costs of the day if he would wait till the next day. On an adjournment for a few minutes, the offer was renewed and respondent's counsel was asked to name and accept his fee, but he declined. The Court then dismissed the appeal with costs. Notice of motion was then served upon the respondent's counsel before he got away, returnable on Friday, to restore the case.

On Friday morning, the last day of the sittings, the motion was made to restore the case for hearing on the merits. Objection was taken that two clear days' notice had not been given of the motion, and the Chief Justice, speaking for the Court, declined to hear the motion upon that ground. It was pointed out that this was a physical impossibility, in view of the case only having been dismissed on the next preceding day but one, and leave was then asked to make an application to the Court to restore the case and that proceedings be stayed in the meantime, on payment of all the costs of the appeal forthwith, and depositing the amount of the judgment in Court. The Chief, speaking for the Court. said that no motion was before them at all, and the Court would do nothing.

We have no doubt that their Lordships feel as keenly as do counsel and solicitors, and the unfortunate litigant who is condemned unheard, their unpleasant obligation to enforce such an obnoxious law simply because it is the undoubted law of the Court.

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THE CONTRACTS OF MUNICIPAL CORPORATIONS.

A CONSIDERATION of this question necessarily involves a discussion of the nature of all corporations; for, for the purposes of those having to do with Ontario law, all such bodies practically owe their origin to the same author, namely, an Act of Parliament. They may be one of a numerous class created under some general Act, or there may be a special statute passed expressly to call a particular body into being. All such Acts are nevertheless passed with reference to certain general pre-existing rules of common law applicable to the particular corporation created, which may be treated as impliedly incorporated in the Act creating the corporation, and which, if applicable, prescribe and define when taken with the statute, its rights, powers, and objects. Of course any one or more of such common law rules must, when expressly excluded by Parliament, gracefully retire, as is always the case when the common law is expressly abrogated or modified, and the ingenuity of the Courts cannot, by interpretation, deprive the statute of its effect.

The principle of common law most frequently applicable to this Parliamentary creature is the rule that a corporation can only act by its seal; with its usual exceptions, of which three are practically undisputed, namely:—

1. Matters of convenience amounting almost to necessity.

2. The acts of Trading Corporations performed within the purposes for which those corporations were created.

3. Insignificant matters of every day occurrence.

These exceptions are expressed in many different ways, and probably there is little, if any, distinction between numbers one and three. Various principles have been suggested for their existence, but they are most likely due to that supreme principle of necessity which knows no law, or of which it may be more accurately, if less epigrammatically, said that it is the foundation of all law. At any rate, they undoubtedly do exist, and so far as they are material to this discussion we shall crave leave to consider them as postulates, and not proceed further with them.

A fourth exception is also frequently suggested, namely, that contracts of corporations when executed, that is when the corporation has received the benefit of them, become binding, though not under seal.

It is round this last alleged exception that the hottest legal fight has raged, some affirming its existence, others, with equal force, denying it; and into this battle the writer has, with the rashness of inexperience, plunged.

First, let it be noticed that the statement of this exception when viewed in the light of some elementary principles of contract seems upon its face to involve an inconsistency. Contract depends upon the existence of an intention common to two or more parties that they shall be mutually bound. Some requisites, such as consideration, a capacity to contract and a sufficient manifestation of intention, are also always required, while certain kinds of contracts require peculiar formalities, such as writing, before the law will recognize or enforce them; but, in all cases, the foundation of the liability upon a contract rests upon a pre-existing intention to be bound, sufficiently manifested. This is the case as well with corporations as with individuals; the difference between them lying in the methods by which their will is manifested.

Apart from the formalities referred to, human beings may signify assent in any way that will show the Court that it exists. The forms in which it may appear in this class of cases are familiar to the law. They spring from characteristics of mind and matter which make up the human entity, and have been reduced to a set of well understood rules; but in the case of corporations it is different. Though an entity

is just as capable in the eyes of the law of forming a contractual intention as an individual, that intention can only be manifested according to the powers with which Parliament, its creator, has endowed it. As before said, Parliament, in the absence of enactment to the contrary, is supposed to incorporate certain general rules, such as that regarding the use of a seal; but beyond this a corporation cannot perform any act except as its author has endowed it with special power to do so. Thus it would seem to involve much the same fallacy to say of this statute-born entity that it can manifest its will in some other manner than that prescribed by its parent statute, as to say that a human being could accept an offer by wagging his tail. Returning then to a consideration of the nature of contract, there seems to be but small hope that the exception claimed for so-called executed contracts can find any logical excuse for its existence as a form of binding agreement.

If we examine the term "executed contract," it seems to mean that, though a corporation did not make an agreement that could be validly enforced as such, or for which nominal damages might have been recovered had it been repudiated by one before either party had done anything under it, yet that the performance of the work contemplated by the other has made that binding which did not originally bind; in other words, that a contract has come into existence which does not depend upon any antecedent common intention sufficiently manifested, but upon the performance by one party of certain acts which he claims are referable to such an intention, though he is unable to show any legal expression of it, or, to put it shortly, that by such means what was not a contract becomes such by the ex parte performance of certain acts.

The difficulty of this position has been keenly felt and has led to a wonderful diversity of opinion.

Some Judges, recognizing, that as corporations can only act by "atturney," to adopt Lord Coke's spelling (Vol. 1, 66b), it is necessary, in order to conserve the rights of those quiescent but most interested members for whom that "atturney" or executive acts, to require a strict compliance with all obligatory, statutory, or common law solemnities

before enforcing any contract alleged, although much loss has fallen upon some trusting individual who saw no distinction between the corporate body and its executive, and who by forgetting that its executive when not acting as prescribed, acted merely as individuals, has conferred a more or less doubtful benefit upon the members of the corporation, who may or may not have had an opportunity of declining the favour he has conferred, but who most certainly did not agree to pay for it.

Other Judges adopt the point of view of the contractor who, having done much, thinks his acts entitled to legal recognition and remuneration, though he has not taken the proper steps beforehand to secure it.

For either view much may be said, and as in each individual case, the actual merits of the case seem to have turned the scale in favour of the contractor or the quiescent member, many Courts have, failing any convenient distinction which may be found, decided in favour of one or the other.

Though this may be unexceptional justice, it is not contract, and the Courts have in their judgments cast about for other grounds upon which to base their decisions. One is to be found in a theory of implied contract. No express contract having been made, the Courts assume one in order to make a company pay for benefits conferred. No mutual agreement capable of proof exists; but for the purpose of doing justice the Court will not allow the parties to say so; but, finding from informal acts what the plaintiff at least expected and was led to expect by the defendant, the Court refuses to allow either to allege anything to the contrary. This is not contract, but estoppel, and in this well-known legal principle will, it is submitted, be found the true basis for enforcing such incomplete contracts as do not contravene the express provisions of a statute; but which nevertheless lack some element prescribed by statute or common law (such as a seal) as essential to the expression of corporate assent. Though this statement is not new, and though in fact, it seems to be the ruling thought in the mind of Mr. Justice Gwynne in writing his judgment in Bernardin v. North Dufferin (*a*), which the majority of the Court adopted, it

(*a*) 19 S. C. R. 581, at pp. 587 to 618.

has not been stated with sufficient explicitness to transfer similar cases from the title "Contract" to that of "Estoppel" in the Digests and Indexes.

The principle is, however, enunciated by Mr. Justice Gwynne in such words as these, "The Court (The Queen's Bench in Sanders v. St. Neot's Union, 8 Q. B. 810) based their judgment on a sound and rational principle that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would be in such a case fraudulent for the corporation, while enjoying the benefits of the work, to refuse to pay for it on the ground that the contract in virtue of which it has been created was invalid for want of a corporate seal, and that reason and justice required that they should not be permitted to commit such a fraud; that they cannot be permitted in fact to appeal to the rule of common law so as to enable them to commit a manifest fraud."

Though this citation refers to a "parol contract," and though again it refers to a contract which is invalid, what is this but the introduction in trenchant terms of the principle of estoppel to compel a corporation to do what is right? To understand better why an alleged agreement not under seal cannot be a contract, let us quote again from Mr. Justice Patteson in Beverley v. Lincoln Gas Light Co. (*b*): "A corporation . . . being merely a body politic invisible, subsisting only by supposition of law, could only act or speak by its common seal."

The common seal in the words of the report in Peere Williams of Rex v. Bigg (*c*) was the hand and mouth of the corporation. Sir John Hagarty in Pim v. County of Ontario (*d*) uses very similar words, and the necessity for retaining the use of the seal as a means of authenticating the corporate will is strongly urged in Mayor of Ludlow v. Charlton (*e*).

(*b*) 6 Ad. & E. 829, at p. 844.
(*c*) 3 P. W. 423.
(*d*) 9 C. P. 302, at p. 312.
(*e*) 6 M. & W. 815.

Accordingly, though with deference be it said, it can hardly be assumed as His Lordship seems inclined to do in Bernardin v. North Dufferin, that the seal is merely a formality not essential to the very existence of a contract; for, without it, apparently, the will cannot be expressed; while the law governing all contracts requires adequate evidence that the contractors intended to bind themselves in the manner alleged. But this is not essential to His Lordship's argument. An estoppel in pais may be pleaded by or against a corporation and no seal is necessary.

It is only essential that the corporation should by its acts have prevented itself from denying the contrary of what is alleged, and this principle has been adopted and extended by Mr. Justice Gwynne and those from whom he quotes or who have subsequently adopted his view, to apply to cases in which a benefit has been conferred as a result of previous informal negotiations.

Whether it has been similarly adopted in England in dealings with municipal corporations may still be a matter of doubt. The cases of Hunt v. Wimbledon (*f*), Young v. Leamington (*g*), and British Insulated Wire Company v. Prescott (*h*), though decided under the special provisions of the English Public Health Act, 1895, do not lend much encouragement to the idea. In Ontario, however, a long line of decisions makes it impossible to believe that some such rule does not exist. Two or three of these decisions will be referred to more in detail, but it may be useful to consider first some general rules which seem to spring from and to be applicable to such cases.

1. Where it can be gathered from the terms of a statute that certain provisions in it are passed on grounds of public policy, any contract made must comply with those provisions, or it is, not only not a contract enforceable as such, but performance of any acts under it cannot give any one a right of action on any principle of estoppel or implied contract.

(*f*) 4 C. P. D. 48.
(*g*) 8 Q. B. D. 579; and 8 App. Cas. 517.
(*h*) L. R. (1895) 2 Q. B. 423.

The terms of the statute are prohibitive and exclusive in their nature, and so no rights can arise out of anything done which does not comply with them. Such are the requisites prescribed by the English Board of Health Acts as interpreted by Hunt v. Wimbledon, Young v. Leamington, and British Insulated Wire Company v. Prescott, and such are the preliminaries prescribed by the Constitution of the City of New York, and dealt with in two cases of Walton v. Mayor of New York, decided February 15th, 1898, of which the only reports so far accessible are those contained in the New York Evening Post of February 15th, 1898, and The Albany Law Journal, Vol. 57, at p. 146; and McDonald v. Mayor of New York (*i*). As explaining this principle it will be in order to quote the language of the Court in the McDonald case, at p. 28, which, in dealing with it, doubtless had in mind many actual illustrations of the necessity for such safeguards: "*Here* there is an express legislative inhibition upon the *City* that it should not incur a liability, unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life and gives it its powers and prescribes the mode of the exercise of them, says it shall not, and hence cannot become liable save by express promise?" And again on the same page we find, "It is plain that if the restriction put upon municipalities . . . be removed upon the doctrine now contended for, there is no legislative remedy for the evils of Municipal Government, which of late (December, 1876) have excited so much attention and painful foreboding."

2. But there may be other requirements either statutory or prescribed by common law, such as the necessity for a seal, which, while imperative in the sense that a corporation can only express its will through their medium, and that therefore such will has not been manifested if they are not found; at the same time do not rest upon any considerations of public policy, and therefore their absence, while preventing the Court from construing certain negotiations as a contract for want of the ordinary incident of a sufficient expression of assent, may yet permit the Court in the exercise

(*i*) 68 N. Y. 23.

of its inherent jurisdiction to compel subjects to do right, to restrain corporations from alleging the absence of these requirements where they have, as such, accepted the full benefit of what has been done, and have at the same time allowed the other party to confer this benefit upon the assumption necessarily known to them, that their benefactors expected to be paid. Such is the necessity for a by-law authorizing a contract by an Ontario municipality under Waterous v. Palmerston (*j*). This, as already mentioned, is not contract but estoppel, and the rules of law applicable to such a state of facts must, it is submitted, be those applicable to the latter and not to the former.

They will be considered more at large in a moment, but to preserve the appearance of classification, it would be well to pass for the present to the next set of requirements.

3. These are such as are contained in a statute, but are in their nature directory only. That is, they prescribe the manner in which the members or officers of the corporate body are to exercise their functions or perform their duties; but they are merely matters of internal economy, and, a contract having been made which complies with the imperative provisions governing a corporation, any irregularity in, or non-compliance with the regulations now referred to do not affect the other parties to the contract, but at most create a liability on the part of the executive to the members.

Under this head would be generally included the manner of calling a meeting of the Executive, or the order of business to be observed at it. The distinction between imperative and directory provisions is referred to by the Judges in Young v. Leamington (*k*), and British Insulated Wire Company v. Prescott (*l*).

4. There is one other form of statutory requirement which may be regarded as permissive only. That is, the statute points out a certain way in which a contract is to be made, but the Court is enabled to find that this contract is

(*j*) 21 S. C. R. 556.
(*k*) 8 App. Cas. 517.
(*l*) L. R. (1895) 2 Q. B. 463.

not intended to exclude the possibility of making the same contract in some other way.

In the Bernardin case, Mr. Justice Gwynne held that the word "may" used in the statute requiring municipal corporations to act only by by-law, was permissive and did not exclude the possibility of the corporation acting in some other way (*m*). This judgment was dissented from by two most eminent Judges, Sir William Ritchie and Sir Henry Strong, but through its adoption by two other members it has become the judgment of the Court.

If we examine the four classes suggested, we find that so far as we are dealing with statutory requirement or restrictions, our first duty in determining the rights and liabilities of a municipal corporation will be one of construction. Does any question of public policy require the presence of a certain formality, then its absence leaves the two parties to a so-called contract without redress. They have infringed the law, and one or both must suffer, while one (the municipality), may have gained a considerable advantage for nothing. This seems hard, but "fiat justitia ruat coelum;" and this is class one.

Then as to number two. So far as statutory requirements are concerned, we ask when coming to it, whether the statute creating a municipality has said "you are to contract in a certain way." If upon the true construction of the statute this is so; then it becomes organically impossible for the corporation to do otherwise. Either it must manifest its share of the consensus ad idem by means of the powers given to it, or it cannot do so at all.

Though it may not be very scientific to class the common law provision as to a seal with such statutory requirements as by-law and resolution, yet this seems to be the place for it, for the seal according to the weight of authority is, in the absence of some special statute deposing it from the position, essentially the organ by which a corporation authenticates its voluntary acts; and such provisions as sections 333, 396 (3), and 429 (1) of the Municipal Act, R. S. O. c. 223, seem to fully accord it this position.

(*m*) 19 S. C. R. at p. 618.

But while a corporation cannot by any voluntary act bind itself without observing the forms prescribed, there is nothing to prevent a Court, in the exercise of its general jurisdiction, from compelling a corporation in a proper case to pay for benefits received or wrongs done by it. So a corporation is liable for its torts committed, and specific performance of a partly performed verbal agreement respecting land has been granted by a Court of Equity upon the principles by which it grants the same relief to and against individuals (*n*).

In a similar way the doctrine of Estoppel applies to corporations, and, as before stated, it is in effect by an extension of this doctrine that Ontario Courts have sought to give relief to persons who have neglected to demand a contract in proper form from corporations before dealing with them.

It also becomes another matter of construction whether the provisions occurring in a statute fall under either classes 3 or 4, but, as, when once this is decided in the affirmative, they do not further affect the question, we had better pass them by.

It is therefore about class two in its various metamorphoses, whether as executed contract or as estoppel, that the discussion still centres.

If logically a question of estoppel, the ordinary rules of estoppel must be sought for and applied; and once they are known, the question whether acts done under imperfect negotiations entitle parties to invoke it then becomes largely a question of fact. If we admit that the common law requisite of a seal falls within this head it will therefore become, not a question of law whether an "an executed contract not under seal can be enforced," but whether, there being no seal, and therefore no contract, are the facts such that the Courts must invoke the doctrine of Estoppel in the plaintiff's favour?

Estoppel, which is always somewhat difficult to apply, becomes infinitely more so when dealing with a municipal cor-

(*n*) Crook v. Seaford, L. R. 10 Eq. 678; 6 Chy. App. 551.

poration; indeed were it not for the necessity for finding some principle on which to base a number of decisions which undoubtedly exist, one might almost wish that contractors with corporations had been left to their antecedent remedy of requiring a strict compliance with all formalities, rather than permit them to pray for a subsequent one when matters are all at loose ends.

The difficulty of application lies in the danger of construing certain unofficial acts as acts of the municipality. A fluctuating body of ratepayers cannot be lightly made liable where there is no valid contract, and where all that can be relied on is the encouragement which their servants and officers have given to the performance of acts in their behalf, even though some benefit may have accrued to them. However, where such benefits have accrued, and where such servants or officers have lent such encouragement, promising payment in a more or less formal manner, and where the work is such that the corporation would not only have power to do it, but is such that it is bound in the discharge of its duties to do, and where it has been accepted and adopted by those who have power to accept and adopt it, then it seems that the corporation cannot be allowed to contend that it did not promise to pay for what has been done. It must not be supposed that the principles here suggested have the direct authority of any particular decision. The cases are very numerous, dating in Ontario from a comparatively early date, and coming down to the present time.

The subject has been several times up for discussion in the Supreme Court, and most lengthy and learned opinions have been written, particularly those of Mr. Justice Gwynne and the late Mr. Justice Patterson in the Bernardin case. In some of these, the doctrine of executed contract has been strongly upheld, while in others it has been with equal force assailed, and even now, the following Judges may be named who have expressed an opinion unfavourable to the existence of any rights upon an unsealed contract: Sir William Ritchie and Sir Henry Strong in the Bernardin case, and Sir George Burton in the Waterous case (*o*).

(*o*) 19 App. R. at p. 50.

It may be observed that the chief means by which a recognition of the work done, or adoption of it, is proved, has been by some resolution or by-law passed either before, or during, or after the completion of the benefits conferred, and though they have been generally considered in the judgment as elements in a binding contract not under seal or not complying with statutory requirements, as to by-laws, etc., it is with great deference submitted that their force may be more logically considered and more clearly understood if treated as facts which prove or disprove the existence of an Estoppel.

It may be also remarked that it is essential to the creation of any liability under this head that the benefit of the so-called contract should have been not only conferred but accepted, or the act done will be treated as executory only, and no liability to pay will be created; and the judgments of the Court of Appeal in Waterous v. Palmerston (*p*) go a great way in deciding that what was agreed upon by both and done by plaintiff was executory only and, not being accepted by the defendants, was not binding upon them.

The leading Ontario cases dealing with the doctrine here discussed are Marshall v. Kitley (*q*); Pim v. County of Ontario (*r*), where the remarks of Sir John Hagarty, at page 311, are to some extent relied on in this paper as bearing out the theory of estoppel; Silsby v. Dunnville (*s*); Waterous v. Palmerston (*t*), and C. P. R. Co. v. Chatham (*u*). But the case in which the subject has been most canvassed is Bernardin v. North Dufferin (*v*), which is generally cited as the leading case. In the judgments of the Judges in the Lower Court and in those of Mr. Justice Gwynne, and the late Mr. Justice Patterson in the Supreme Court, almost every case in England, Ontario, and Manitoba is referred to.

SHIRLEY DENISON.

(*p*) 19 App. R. 47.
(*q*) 4 C. P. 373.
(*r*) 9 C. P. 504.
(*s*) 31 C. P. 301; 8 App. R. 524.
(*t*) 20 Ont. R. 420; 19 App. R. 47; 21 S. C. R. 556.
(*u*) 25 Ont. R. 465; 22 App. R. 330; 25 S. C. R. 608.
(*v*) 6 Man. L. R. 88; 19 S. C. R. 581.

MALICE IN LAW AND IN FACT.

No two words in legal phraseology are more difficult to define than "Malice" and "Fraud"; and none have been the subjects of wider divergence of opinion, among the profession, as to their proper weight as determining factors in actions of tort and contract. The Master of the Rolls, Lord Esher, once said: "We have been invited to define malice. One cannot do so any more than one can define fraud, and I certainly shall not attempt it. Every one knows what is meant by a man acting maliciously. The only recognized tribunal that can decide whether an act is or is not malicious is a jury."

Mr. Justice Hawkins' words, in a recent case, are much to the same effect: "In legal acceptation the terms 'malice' and 'maliciously' comprise so many wrongful motives and acts, the cases bearing upon them are so numerous, and the pleaders, both ancient and modern, so far as they exist, have been in the habit, out of extreme caution, of grouping them with such a host of other expletives, that one derives but little valuable information from the mere use of the terms as to the sense in which they are employed."

Notwithstanding the misgivings of these eminent jurists as to their inability properly to define them, countless Judges in all countries, wherever the principles of the common law of England are recognized, are daily expounding the various shades of meaning which attach to these terms in the infinite variety of cases that come before them. How great the need then for the legal practitioner to have well fixed in his mind the distinction between "legal malice" or "implied malice," and "actual malice" or "malice in fact," and the different effect the absence of the one or the other has in determining whether an act does or does not constitute a cause of action.

Malice in fact in its popular sense means spite, ill-will, malevolence. Malice in law, or implied malice, is wrongful conduct which violates a right. Legal malice does not necessarily impute malevolence. The best definition of malice,

and the one most frequently quoted, is that given by Mr. Justice Bayley, in Bromage v. Prosser (*a*).

"Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

It is a well-settled principle of law, that a lawful act is not converted by a malicious or bad motive into an act so as to subject the doer to an action at law. The Lord Chancellor aptly defines this principle in the case of Bradford Corporation v. Pickles (*b*).

"If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it."

Parke, B., in Stevenson v. Newnham (*c*), enunciates the like principle: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

If there has been no violation of a right, malice of itself gives no cause of action, although damage may result in consequence of the act. It is *damnum sine injuria*.

In actions for malicious prosecution, the question of malice is purely one of fact, and is presumed, if the defendant acted without reasonable and probable cause. On the other hand, it may be proved, he was actuated by the bitterest malice, and yet he is not liable, if he had reasonable and probable cause for prosecuting.

Mr. Justice Hawkins clearly points out what is necessary to be proved in actions of this kind in Hicks v. Faulkner (*d*): "To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things—absence of reasonable and probable cause and malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether."

(*a*) 4. B. & C. at p. 255.
(*b*) L. R. (1895) A. C. at p. 594.
(*c*) 13 C. B. at p. 297.
(*d*) 8 Q. B. D. at p. 170.

While, as has been stated, from the want of probable cause, malice may be implied, the converse is not true, that from the most express malice the want of probable cause cannot be implied. The malice necessary to be established in actions of this kind is not malice in law, but malice in fact. Although the jury may infer such malice, that is, malice in fact, from the want of reasonable ground for the prosecution, yet they are by no means bound to do so. The question of malice is wholly one for the jury. Even if they think there was want of probable cause, yet they may think the defendant acted honestly and without any other motive than to do what he bona fide believed to be in the interests of justice, and thus find there was an absence of malice.

Maliciously to procure or induce one to break his contract, whereby damage is caused, either to the contractor or contractee, is actionable. The leading case on this branch of the law is Lumley v. Gye (*e*). In this case the defendant, the rival manager of a theatre, induced a young lady, who had been engaged to perform and sing at the plaintiff's theatre, to break her engagement and leave, and continue away during the term for which she had been engaged. On demurrer it was held the action would lie, and that it was not necessary, in order to sustain such an action, that the employer and employed should stand towards each other in the strict relation of master and servant. Coleridge, J., who differed from a majority of the Court, strenuously held that on principle, and according to authority, the remedy for breach of such a contract should be confined to the contracting parties. He further held the damage was too remote, where it was caused by the wrongful act of a third party; and that such actions were limited to cases arising between master and servant, and were exceptions grafted on the general law, traceable to the Statute of Labourers, passed in the reign of Edward the Third.

In 1881 the Court of Appeal, in Bowen v. Hall (*f*), affirmed the decision of the majority of the Judges in Lumley v. Gye. Brett, L.J., in delivering his judgment, said:

(*e*) 2 E. & B 216 (1853).
(*f*) 6 Q. B. D. 333.

"Merely to persuade a person to break his contract may not be wrongful in law or fact. . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant, at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and, therefore, a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley v. Gye, and which is complained of in the present case, is therefore, because malicious, wrongful."

Temperton v. Russell (*g*) was decided upon the like principle as in the two cases referred to. The Court, however, carried the doctrine a step further, by holding that an action would lie for maliciously inducing another not to enter into a contract, and by definitely establishing the principle that the doctrine applied to contracts of every description. Cotton, L.J., in his judgment gave a clear definition of the malice necessary to support the action: "Now, in my judgment, it is perfectly clear law, that to induce a person who has made a contract with another to break that contract in order to hurt the person with whom it has been made, to hamper him in his trade or to put undue pressure on him, or to procure some indirect advantage for the person himself, to induce another to break a contract, for any of these motives is, in point of law, to do it maliciously . . . and a cause of action would be established."

The great case of Allen v. Flood (*h*), which deals almost exclusively with the ingredient of malice in giving a right of action for inducing or procuring the breach of a contract, is one of the ablest, and most exhaustive on this branch of the law, of modern times. The Law Quarterly Review of January, 1898, in referring to it says: "At present we can only express in the fewest words our conviction that the House of Lords has never deserved better of the Common Law."

(*g*) L. R. (1893) 1 Q. B. D. 715.
(*h*) L. R. (1898) A. C. 1.

The litigant parties were members of rival trades unions of workingmen, employed by the Glengall Iron Company in repairing an iron ship. A dispute having arisen between them, the Glengall Iron Company was induced by the iron-workers to discharge the ship-carpenters, because on a former occasion they had wrought in iron as well as wood. The men discharged by the company were engaged from day to day, and consequently no action would lie against the company for doing what they thus had a right to do. Mr. Justice Kennedy, who presided in the Court of first instance, submitted the following questions to the jury:

1. Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs, or either of them from their employment? This was answered in the affirmative.

2. Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them? This likewise was answered in the affirmative.

On these findings the Judge directed a verdict to be entered for the plaintiffs for £40. On appeal this verdict was unanimously sustained (i). On appeal to the House of Lords, so diverse was the opinion of the law lords, that in accordance with an ancient practice, Her Majesty's Judges were summoned to be present on a re-hearing, and to tender their advice as assessors. Eight assessor Judges were present when the re-hearing took place before nine law lords. The question submitted by the law lords to the assessor Judges was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" Six of the assessor Judges found in favour of the plaintiff and two against. The decision of a majority of the Law Lords, however, was for the defendant, there being six to three. The reporter of the Times Law Reports stated, "that probably no precedent exists in which their Lordships have overruled such a preponderance of judicial opinion. Four Judges below had unanimously been in favour of the plaintiffs, and thus, on

(i) L. R. (1895) 2 Q. B. 21.

this side, with the six assessor Judges and dissentient majority of the Lords, there were thirteen; and on the other side eight, six Law Lords and two Judges."

The ratio decidendi of the House of Lords was that as no action would lie against the Glengall Iron Company by the plaintiffs for dismissal, as the employment was not for a specified time, but from day to day, being thus liable to be discharged at any time, so no action would lie against those who procured their dismissal, however malicious might have been their motive. Defendants, in other words, only induced the company to do what they, the company, had a legal right to do. Accordingly, since no legal right had been violated, no legal injury was done them. This decision would seem to be in accord with Bayley, J.'s, definition of malice already given, which eliminates motive altogether. It includes only "wrongful" acts intentionally done. A malicious motive does not make "wrongful" an act that otherwise would not be so.

The decision is in harmony, too, with the dictum of Parke, B., in Stevenson v. Newnham (*j*): "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." And also with that of Lord Watson in Bradford Corporation v. Pickles (*k*): "No use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." The result of the decision, in this important case, is happily expressed in the following extract from the judgment of Lord Macnaghten at page 154: "I cannot, therefore, agree with the Master of the Rolls in thinking that the act complained of was 'wrongful,' because it was 'malicious,' and that if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not."

In so deciding the House of Lords did not question the decisions in Lumley v. Gye and Bowen v. Hall. They held

(*j*) 13 C. B. 297.
(*k*) L. R. (1895) A. C. 587.

simply on the ground, as no legal right of the respondents had been infringed, no unlawful act done, and no unlawful means used, in procuring their dismissal, the appellant's conduct was not actionable, however malicious or bad his motive might be. In fact, that malice was not an element that should enter into the consideration of their judgment. It over-rules, however, the case of Carrington v. Taylor (*l*).

A somewhat similar case has recently been before the Supreme Court of Canada (*m*), in which Allen v. Flood underwent consideration in the judgment of Mr. Justice Girouard.

This is destined to be the great leading case in all suits in which malice enters as a determining factor, whether certain acts are actionable or not. For this reason, it is regrettable, there was such a diversity of opinion among the Judges and Law Lords. With how much greater satisfaction would it be regarded by the profession did it carry with it the weight of the profound learning and great legal ability of the Lord Chancellor and Mr. Justice Hawkins.

St. John, N.B. SILAS ALWARD.

(*l*) 11 East 571 (1809).
(*m*) Perrault v. Gauthier, 28 S. C. R. 241.

EDITORIAL REVIEW.

Supreme Court Practice.

We referred to a very distressing case of miscarriage of justice in our last regular number under the above caption, adding that we had no doubt that their Lordships of the Supreme Court felt, as keenly as the counsel, solicitors and unfortunate litigant, their unpleasant obligation to enforce an obnoxious law simply because it was the law of the Court. Our remarks in this connection seem to have been misunderstood, and to have been treated as if we approved of the action of the Court in dismissing an appeal from the highest court in the Dominion without a hearing, just because some one did not want to wait one day. On the contrary, while there is no doubt that the Judges have made that practice the law of the Court, we distinctly stated that it was obnoxious; and we now add, hardly creditable to a civilized community. If such a case were reported to us as a specimen of the administration of justice in China, we would shrug our shoulders and say, "What else could you expect of China, a half-civilized country?" And when it is told of our own country—well, all we can say is that it occurred very near to La Chine.

We have no reverence for such a law or practice, for the simple and easily understood reason that it is not only not just, but is distinctly unjust. As Carlyle says, "The gowns of learned serjeants are good; parchment records, fixed forms, and poor terrestrial justice, with or without horsehair, what sane man will not reverence these? And yet, we hold, the man is not sane but insane, who considers these alone as venerable. Oceans of horsehair, continents of parchment, and learned serjeants' eloquence, were it continued till the learned tongue wore itself small in the indefatigable learned mouth, cannot make unjust just. The grand question still remains, Was the judgment just? If unjust, it will not and

cannot get harbour for itself, or continue to have footing in this universe, which was made by other than One Unjust."

No amount of horsehair wigs can make that law a just one which condemns a litigant unheard. The Court sits to hear litigants if they desire to be heard. And the litigant in this case did desire very much to be heard; but the Court added the condition that he should be heard only if he did what was impossible.

Now, we reiterate that we think their Lordships must have felt keenly their obligation to enforce the obnoxious law. First, because it is obnoxious, unjust; is made of horsehair and parchment, which are dead, and will not stand reargument in the highest Court "where the universal soul of Fact and very Truth sits President"; because the Court sits to do justice, and justice was not done, but injustice was done. Secondly, because the Court made the law itself, and it is not just. And when the Court's production is born —a poor, maimed, halting, distorted semblance of justice, and is labelled with the highest and most sacred name in the universe—should they, must they, not feel keenly when they see their little cripple flouted for his ambitious name; not only an object of ridicule, but a vicious and mischievous dwarf. If they did not feel keenly they would not be human, but inhuman. But they are human, and so must feel it keenly.

Thirdly, they must feel keenly because, being the highest Court in the Dominion, and therefore expected to give the best of all decisions, they have given the worst, and only because they have done the same before.

Fourthly, because, if they consider parchment and horsehair and fixed forms as better than the justice of the Court of Courts of the universe, where the soul of Fact and very Truth sits President, there are parliaments and "statuting, three readings and royal assents"; and "dissolution, explosion and the everlasting laws of nature will incessantly advance towards it; and the deeper its rooting, more obstinate its continuing, the deeper also and huger will its ruin and overturn be." People want a fair hearing and anxious consideration and the best of human judgment from the Court

which they pay so highly to administer their justice. And if they ask for justice and get injustice they will inevitably appeal to a higher tribunal.

This is the inevitable and natural course—recourse to Parliament. It will come as naturally as the rain and sunshine, and in the end it will prevail. And if there never before was a case for reformation there will be one ready when the time comes for the asking.

We hope now that we shall no longer be misunderstood. With all respect for their Lordships in their official and individual capacities, with every desire to aid in maintaining respect for the highest Court in the Dominion, it is impossible to overlook the fact that they have done injustice and not justice, and no amount of argument will show the contrary.

The Court of Appeal.

The appointment of Mr. James F. Lister, Q.C., to the Court of Appeal now completes the constitution of the Court, which has been lacking a Judge for more than a year. The Divisional Court appeals, which have been awaiting a hearing, will now get an opportunity; but, as we pointed out when the Act enlarging the Court was passed, the other business of the Court cannot be speeded by the change.

BOOK REVIEWS.

The Law of Mines in Canada. By WM. DAVID MCPHERSON and JOHN MURRAY CLARK, M.A., LL.B., of Osgoode Hall, Barristers-at-Law. Toronto: The Carswell Co. Limited. 1898.

At this particular time Messrs. McPherson and Clark's book ought to be received with gratitude. It is a most comprehensive work, and covers every branch of the law in connection with mines. The opening chapter on constitutional matters is more of historical than practical interest, as so many cases have been decided as to the property rights of the Dominion and its various provinces, both with respect to land and minerals. The learned authors deal then with contracts, leases, licenses, working of the mines, sales, the interpretation of contracts and grants, the rights of support, and rights respecting water, both surface and subterranean. The Mining Acts and regulations of the Dominion and Provinces are printed in full and annotated. A chapter explanatory of terms in use and a glossary are useful parts of the work. The volume, including the index, is over 1300 pages, and owing to the limited circulation of such a work the publishers have fixed the price at $20. Though this appears large it will repay anyone having occasion to look into mining law to possess themselves of the book.

The Hudson's Bay Land Tenures and the occupation of Assiniboia by Lord Selkirk's settlers, with a list of grantees under the Earl and the Company. By ARCHER MARTIN, Esq., Barrister-at-Law (of the Canadian Bar). London: William Clowes & Sons, Ltd. 1898.

Manitoba and the North-West Territories always awaken an interest as the land of adventure, and any contribution to the history of the settlers is welcome. Mr. Martin's book possesses more than the ordinary interest, for it is based upon accurate information. He has taken the pains to delve into the records for the purpose of finding the names

of the original grantees of the Earl of Selkirk and the Hudson's Bay Company. The charter of the company is printed in full, as well as the deed of grant to the Earl, and various references are made to evidence and other authentic records. The semi-historical character of the work renders it most interesting, while the information imparted respecting the legal side renders it most useful.

Principles of the Common Law. Intended for the use of students and the Profession. By WM. INDERMAUR, Solicitor, author of "Manual of Practice," "Epitomes of Leading Cases," "Manual of the Principles of Equity," etc., etc. Eighth edition. London: Stevens & Haynes. 1898.

The surprising popularity of this book has caused it now to reach its eighth edition. It contains an excellent grounding for students, and, covering as it does the latest cases, it may well stand in good stead to practitioners for ready reference.

An Analysis of the Twelfth Edition of Snell's Principles of Equity, with notes thereon. By E. E. BLYTH, LL.D., B.A. (LONDON), Solicitor; Incorporated Law Society's Clifford's Inn (First) Prizeman, Mich. 1878, Broderip Conveyancing Gold Medallist, 1878, and Scott Scholar, 1878, and First in First-Class Honours, LL.B., London University, 1885. Sixth edition. London: Stevens & Haynes. 1898.

After having read Snell, but not before, the student may consult this book in order to test his knowledge. But we would warn him not to rely on the analysis solely. A useful method of testing his knowledge would be for him to write down his own analysis and see how it compares with Mr. Blyth's interpretation.

THE

CANADIAN LAW TIMES.

AUGUST, 1898.

PROBABLE CAUSE OR MALICE IN MALICIOUS PROSECUTION.

THE legal requirements for success in an action for malicious prosecution are in some measure similar to those in actions of libel and slander. The mode of presentation is different, because privilege in libel and slander is a defence, while in malicious prosecution want of probable cause is part of the plaintiff's case. But privilege and malice are often developed before the defence is entered upon, and in practice the form in which the issues are actually made clear is much the same. Privilege in the one rests upon proof of interest in the subject matter both in the person speaking and in the one addressed, and must indicate to the Judge a state of circumstances justifying the use of the language objected to. Probable cause depends likewise upon a state of circumstances existing which satisfy the Judge that reason existed for laying the charge. Here the exact parallel ceases, because, in libel or slander, malice destroys the privilege, while in malicious prosecution it does not disturb the protection afforded the defendant by a ruling that he had reasonable and probable cause. But in practice, just as the malicious or improper use of the privileged occasion in libel and slander forfeits for the defendant the immunity he claims, so malice is used in actions of malicious prosecution as showing that the defendant could not or did not believe in the truth of the charge which he had formulated.

The recent and widely discussed case of Allen v. Flood (*a*) is of interest not only because of the wide diversity of opinion on the main question discussed (*b*), but on account of the way in which the effect of malice in actions for malicious prosecution is treated. It was not a decision in such an action, but as it contains a most exhaustive examination of the importance of malicious motive generally, it throws much light on its proper place in what Lord Davey (*c*) calls an "anomalous action." By almost all of the Judges and Law Lords who debate the point, actions for libel and slander and malicious prosecution are treated as similar, and the defence of privilege practically applicable to each, subject to being defeated by the proof of malice. The late Mr. Justice Cave (*d*) says: "For reasons of public policy resort to legal process is justifiable wherever there is reasonable and probable cause, so that there must not only be want of reasonable and probable cause, but also malice, yet the proof of malice does not involve the recognition of a new right, but simply affords an answer to a state of circumstances under which the violation of these elementary rights would not be actionable."

And Lord Davey, though disagreeing with the views of Cave, J., on the point at issue in the particular case, approves of his reference to actions for malicious prosecution, for he says (*e*): "But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance, expense and possible loss of reputation of a causeless prosecution." See also per Lord Watson (*f*), per Hawkins, J. (*g*). The comparison is an aid to better understanding. Eliminate for the moment cases where the defendant is held to have had probable cause,

(*a*) L. R. (1898) A. C. 1.

(*b*) The case was argued before the House of Lords, and it was re-argued again before a fuller House with the (in modern days) unusual addition of eight Judges who were summoned to attend. Six Law Lords, with whom agreed two Judges, reversed the decision of the Court of Appeal, against three Law Lords, with whom agreed six Judges.

(*c*) P. 172.

(*d*) P. 29.

(*e*) P. 172.

(*f*) P. 93.

(*g*) P. 19.

in which event there is an end of the action, just as a ruling in libel and slander actions that the words are not libellous disposes of the case. Then we have a comprehensible form of action for each tort, one in libel and slander, where the defence is that the words were spoken on a privileged occasion, and the other for malicious prosecution, where the defence is that, though unreasonable, the prosecution was legally done and was for a legal offence. In each case there is protection afforded unless malice in fact is proved. And the parallel is not forced, because the reason in each case is the same, namely, duty, owed in one case to an individual and in the other to the public. In libel and slander a man is protected because he is said to be performing a social or moral duty (*h*). In malicious prosecution he is shielded because we rely in this country on private initiative in most cases for the punishment of crime (*i*).

It is essential to the plaintiff's case in an action for malicious prosecution to prove two things. First, that the defendant had not reasonable and probable cause for what he did, and, second, that he was actuated by malice (*j*).

The former is a question for the Judge alone, the latter is for the jury, and must indeed be left to them in express terms (*k*). And, as a matter of law, want of probable cause cannot be inferred from malice (*l*). But from want of probable cause, malice may be and most commonly is, implied. Lord Esher (in Brown v. Hawkes, ante p. 726) perhaps puts it more accurately in this sentence: "Now, although it is correct to say that want of reasonable and probable cause for the prosecution is some evidence of malice, *it goes before the jury with the other facts of the case* which go to establish the existence of malice."

To many Judges and text writers it has appeared that the division of the judicial duty involved in a finding for the

(*h*) See *per* Lindley, L.J., in Stuart v. Bell, L. R. (1891) 2 Q. B. 341.

(*i*) See *per* Cave, J., in Brown v. Hawkes, L. R. (1891) 2 Q. B. 718.

(*j*) Anonymous case, 6 Mod. 73 (1704); Farmer v. Darling, 4 Burr. 1971 (1766); Brown v. Hawkes, (1891), 2 Q. B. 718.

(*k*) St. Denis v. Shoultz, 25 App. R. 131.

(*l*) Sutton v. Johnstone, 1 T. R. 493 and 510, at p. 544.

plaintiff is useless and tends to complicate matters. But it is quite clear that the separation has always existed, and that the Bench is responsible for introducing theories that have tended to run one finding into another, so that the line of demarkation is almost obliterated in practice. It is easy enough to understand that a Judge is the proper person to determine whether the state of facts existing when the defendant laid his charge was such as to render it reasonable that he should do so, and that the jury should pronounce whether he acted with malicious intent. But when it is laid down that the Judge must take into account the state of the defendant's mind, and that the jury must do so too, it is evident that the tendency will be to leave it all to be done by the jury, and thus evade or shift the responsibility. And this transfer of duty is helped along by the extension of the definition of malice which recent years have witnessed.

The method now adopted in judicial practice is to direct the jury hypothetically, that if they find so and so then there is or is not probable cause and to take a general verdict. Of this, one of the best instances is the charge of Cave, J., in Abrath v. N. E. Ry. Co. (*m*), in which his charge to the jury was upheld by the Court of Appeal and the House of Lords. Whether this mode is the best or clearest may be an open question, but it must be admitted that it is now generally adopted, and that it has practically resulted in the *absorption by the jury of the duty of the Judge.* But as long as the decisions stand which insist on making the plaintiff's success dependent on proving both these factors, it is necessary to understand exactly the limits of each.

Want of reasonable and probable cause must be affirmatively proved by the plaintiff, so must malice. Lord Justice Bowen (*n*) has put the first requirement thus, that it must be proved "that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the evidence of reasonable and probable cause," and the latter in this way "that the proceedings of which" (the plaintiff) "complains were initiated in a malicious spirit: that is, from an indirect and improper motive, and not in furtherance of justice."

(*m*) L. R. 11 Q. B. D. 79; *ib* (C. A.) 440; 11 A. C. 247.
(*n*) Abrath v. N. E. Ry. Co., L. R. 11 Q. B. D. at p. 455.

This seems a workable description of the matters to be proved, but when the phrase "circumstances of the case" has to be explained difficulty at once arises. Lord Denman, though not the first to analyze the facts from which probable cause was to be deduced has put their complex nature clearly. He said, in delivering the judgment of the Court in Turner v. Ambler (*o*) that "among the facts to be ascertained is the *knowledge of the defendant* . . . and also the *defendant's belief* that the facts amounted to the offence which he charged." Mr. Justice Hawkins has even subdivided more finely (see Hicks v. Faulkner (*p*)) into 1st, an honest belief in the guilt of the accused; 2nd, an honest conviction of the existence of the circumstances on which such belief is based; and has added to them, 3rd, reasonable grounds for such belief; 4th, the existence of such circumstances as amount to reasonable grounds for such belief.

It is this splitting up of the defendant's mental condition that has given rise to the impossibility of drawing any clear and satisfactory line between the absence of reasonable and probable cause and the presence of malice. If the defendant has no honest belief in the guilt of the accused, nor that the facts amounted to the offence which he charged, nor in the existence of the circumstances on which his belief is based, it seems well nigh hopeless to acquit him of malice.

But malice requires to be proved and there must be some solution for requiring its presence, unless it is assumed that the extension of the enquiry under the first branch of the case has so widened as practically and always to include the latter.

Starting with the original proposition that reasonable and probable cause is not a state of mind, but an inference from existing facts, such as "would create a reasonable suspicion in the mind of a reasonable man" (*q*), there appears not unnaturally to have grown up the conviction that a man's belief or want of belief in those facts must be an ingredient in determining whether the cause of his action was reason-

(*o*) 10 Q. B. 252 (1847).
(*p*) L. R. 8 Q. B. D. 167.
(*q*) *Per* Lord Campbell in Boughton v. Jackson, 18 Q. B. 378.

able or unreasonable, and whether guilt was probable or improbable. Indeed, the phrase itself carries the mind in that direction. "Reasonable" may be referred to the conclusion of one mind, "probable" to the effect of the same state of facts upon the minds of several.

It is evident that probable cause has come to depend upon two things, circumstances outside the mind itself which warrant any reasonable person indulging in suspicion—overt acts, so to speak—and, secondly, circumstances in the mind, such as knowledge and belief. This is well illustrated in the case of Venafra v. Johnson (*r*), where the defendant prosecuted the plaintiff for having threatened him. The Court in effect held that even if the making of the threat were proved, yet, unless the defendant believed that the threat was really intended and was not simply *brutum fulmen* there was not probable cause.

If these two factors had been kept separate, and reasonable and probable cause had been made to depend on the outside circumstances—the Judge putting himself for the nonce in the defendant's place and ruling accordingly—and the defendant's state of mind, belief, and motive had been left to the jury as determining malice or no malice, the action for malicious prosecution would have been immensely simplified.

The almost impossible task of keeping them separate in the action as now understood and worked out is of course greatly increased by the circumstance that (unlike actions of libel and slander, where honest belief that the person spoken to had an interest in the subject matter will not support privilege (*s*)), honest belief in untrue facts will exonerate a defendant.

What the defendant in malicious prosecution often relies on turns out to be untrue, and at the trial the so-called facts may appear to be non-existent, and the true facts may be something quite different. The facts which must shield the defendant must then be the untrue or apparent facts and

(*r*) 10 Bing. 301.

(*s*) Roberts v. Climie, 46 U.C.R. 264; Hebditch v. McIlwain, L. R. 1894, 2 Q. B. 54.

not the true facts. The defendant believed in their existence and, to him they were actual facts, so that probable cause may depend on apparent facts coupled with knowledge of and belief in them. And this has given rise to a further enquiry into the state of the defendant's mind, which Mr. Justice Hawkins, as we have seen, thus divides, "an honest conviction of the existence of the circumstances on which such (honest) belief is based" and "the existence of such circumstances as amount to reasonable grounds for such belief (*t*). And a sort of minor subdivision of this enquiry is developed in such a case as Musgrove v. Newell (*u*), where it was debated and decided that subsequent information did not alter the facts on which the defendant had the right to rely, though it might weaken the inference to be drawn from them; a case which is useful merely as an illustration on this point and not as a decision of present authority.

This examination makes it apparent that as the enquiry into the state of the defendant's mind has become almost the dominant factor in determining whether reasonable and probable cause exists, the difficulties of steering clear of trenching upon the domain of malice increase. In the well-known case where the apparent facts disappeared at the trial (*v*), there was much discussion as to whether it should have been left to the jury to determine whether the defendants took reasonable care to inform themselves of the true state of the case. Mr. Justice Cave, who tried it, charged the jury that if the defendant did not take reasonable care there was probable cause, while leaving it to them to determine the fact. Lord Bramwell doubted whether the trial judge should have left that question to the jury, and indeed Mr. Justice Cave in a later case, though doing the same thing, doubted it himself (*w*); but the result of the whole decision is that it was a proper question. The statement of Sir Richard Couch in Bank of New South Wales v. Piper (*x*), that a similar question ought not to have been submitted to the

(*t*) *Ante*, Hicks v. Faulkner, L. R. 8 Q. B. D. 167.
(*u*) 1 M. & W. 582.
(*v*) Abrath v. N. E. Ry. Co., L. R. 11 Q. B. D. 79; *ib* C. A. 440.
(*w*) Brown v. Hawkes (1891), 2 Q. B. at p. 721.
(*x*) L. R. (1897) A. C. 383.

jury, must be understood as based on his opinion that the trial judge should have ruled that there was probable cause. In Brown v. Hawkes, Mr. Justice A. L. Smith's judgment affords an example of how inextricably involved do the two questions become when once an analysis of the defendant's mind is entered upon, for he treats (*y*) the finding of the jury that the defendant honestly believed in the charge which he laid as meaning that his mind was so warped by ill-will that he brought himself to believe in the truth of an unfounded accusation.

Whether it should be left to the jury to say if proper enquiry into the facts was or was not made has been the occasion of considerable debate. In this respect the decisions are not consistent with those in actions of libel and slander. The Court of Appeal in Clark v. Molyneux (*z*) dissented from that portion of the charge of Huddleston, B., where he asked the jury whether the defendant had good grounds for believing the statements he made. But in the Quartz Gold Mining Co. (*zz*), Brett, M.R., held that a man was not justified in relying on newspaper allegations without proper enquiry. It is true that in Maclaren v. Archibald (*a*) it was in effect laid down that it was unnecessary to leave to the jury whether the police official believed the story of the informant and took precautions such as a reasonable man should have done to enquire into its truth, but that was partly because it was asserted that unless an officer could act on such statements efforts to put down vice would be unavailing. Gwynne, J., puts it on much more plausible ground in saying that unless the Judge thought that the facts should have created a doubt as to his belief, there was nothing to leave to the jury. But in Brown v. Hawkes (*b*), and in Abrath v. N. E. Ry. Co. (*c*), the question was expressly left to the jury, and must now be considered as

(*y*) p. 724.
(*z*) L. R. 3 Q. B. D. 237.
(*zz*) L. R. 11 Q. B. D. 674.
(*a*) 21 S. C. R. 588.
(*b*) L. R. (1891) 2 Q. B. 718.
(*c*) L. R. 11 Q. B. D. 79, 440.

a proper one. The House of Lords in Lister v. Perryman (*d*) thought that if the suspicious circumstances might have been readily dissipated by proper enquiry, then if no enquiry is made, there was some evidence of want of probable cause.

The result seems to be, as gathered from the cases, that facts or apparent facts, if known to, and honestly believed by the defendant, and reasonably investigated by him, will (if they present to the eye of the Judge reasonable and probable cause for the action taken) protect the defendant.

The method adopted of reconciling this apparent overlapping of the two questions has been to say that want of reasonable and probable cause is some evidence of malice and goes to the jury, on that branch of the case, with all the other circumstances. For it must not be forgotten that to prove want of probable cause without malice is not enough; nor is it sufficient to show malice if there exists probable cause. Because no matter how evil-minded or spiteful a man may be, if the circumstances show that he had reasonable and probable cause for what he did, he cannot be punished because his motives were not honourable.

As has been pointed out, the action for malicious prosecution is exceptional. The importance attached to the effect of the state of the defendant's mind on the question of reasonable and probable cause has resulted in rendering less clear the principle that lies at the root of holding proof of malice essential. Indeed, two learned Judges in Flood v. Allen (*e*), have expressed themselves that the vital point is the "intention of the prosecutor, the state of his mind," and in effect say that if there was a special verdict finding that the defendant did not think there was any ground for prosecution, or did not bona fide believe there was reasonable cause to prosecute, the conclusion of malice in law would be inevitable. But this goes much further than is necessary, and it is fairer to say that it goes on the question of malice with the other facts of the case to the jury.

The jury are the sole judges of malice, and it has been said, and indeed follows from that fact, that they are not

(*d*) L. R. 4 H. L. C. 521.

(*e*) North, J., at p. 41, and Wright, J., at p. 63.

bound by the holding of the judge that there is not probable cause (*f*). As put by Graham, E.J., in Hawkins v. Snow (*g*), "failing proof of a specific motive and that it was wrong" (i.e., a wrong one) "they had still to say whether the prosecution could be accounted for except by imputing an indirect or improper motive to the prosecutor."

The definition of malice most favourably received by the House of Lords in Flood v. Allen is that of Bayley, J., in Bromage v. Prosser (*h*): "Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse," and if the parallel is accepted between actions of libel and slander and those for malicious prosecution, Lord Esher's description of it in Baker v. Carrick (*i*) may be adopted. "He abuses the occasion if he does not use it fairly, but uses it to gratify some personal motive of his own. That is what is meant by malice in fact." Other definitions may be given: "Any improper or sinister motive" (*j*). "Malus animus—improper or indirect motive" (*k*). "Either spite or ill-will or indirect or improper motive" (*l*). "Some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice" (*m*).

Dealing still with the defendant's state of mind, it must not be forgotten that in the Royal Aquarium v. Parkinson (*n*), malice was founded not upon knowledge of the untruth of what the defendant uttered, but on the fact that he had allowed his mind to fall into such a state of gross and unnecessary prejudice that he made defamatory statements, careless whether they were true or not. And in Brown v.

(*f*) Huddleston, B., in Quartz Gold Mining Co. v. Eyre, L. R. 11 Q. B. D. 674, at p. 687, agreeing with Hawkins, J., in Hicks v. Faulkner, *ante*.

(*g*) 27 N. S. at p. 414.

(*h*) 4 B. & C. at p. 247.

(*i*) 9 R. 283, at p. 284.

(*j*) *Per* Tindal, C. J., in Stockley v. Hormidge, 8 C. & P.

(*k*) *Per* Parke, J., in Mitchell v. Jenkins, 5 B. & Ad. 595.

(*l*) *Per* Hawkins, J., in Hicks v. Faulkner, L. R. 8 Q. B. D. 174.

(*m*) *Per* Cave, J., in Abrath v. N. E. Ry. Co., L. R. 11 Q. B. D. 443.

(*n*) L. R. (1892) 1 Q. B. 431.

Hawkes (ante), A. L. Smith, J., in his dissenting judgment, states that malice may properly be found if the defendant gets into such a state of mind as to believe in the truth of a groundless charge.

The damages which must be proved are any of three elements: First, damage to a man's person, as by being taken into custody; second, that he has been put to expense in defending himself, and third, that his fair fame or credit has been injured (*o*).

And it is necessary to bear in mind the difference pointed out in Austin v. Dowling (*p*), between proof of damage in an action for false arrest and imprisonment and in one for malicious prosecution where, on a charge laid by the defendant, the plaintiff is arrested by a ministerial officer. Upon the matter coming before a judicial officer, the false imprisonment ceases, because after that if the plaintiff is held "the opinion and judgment of a judicial officer are interposed between the charge and imprisonment."

Malicious prosecution begins when the defendant is brought before a judicial officer, false arrest ends at the same time. If the magistrate have no jurisdiction at all to hear the charge, the action should not take the form of an action for malicious prosecution, to which a complainant is not liable if he lay the charge in good faith. The essential ground of that action is maliciously and without reasonable and probable cause carrying on a *legal* prosecution. But where the magistrate has no jurisdiction, then, provided the defendant has directly interfered in and caused the arrest, the action should be one of trespass (*q*).

To sum up. The plaintiff must prove: (1) his innocence of the charge; (2) want of reasonable and probable cause; (3) malice in fact. The Judge alone must rule whether the plaintiff has proved want of reasonable cause, but may leave it to the jury to find the facts on which his ruling is to be based. He may also ask them as to the knowledge, honest

(*o*) *Per* Lord Holt, in Saville v. Roberts, 1 Ld. Rayd. 374.
(*p*) L. R. 5 C. P. 534.
(*q*) Grimes v. Miller, 28 O. R. 764.

belief and state of mind of the defendant, and whether he took reasonable means to satisfy himself as to the true facts. He may charge them hypothetically, giving them his ruling in advance and depending on their findings. The jury must find on the question of malice, and may consider the facts on which the Judge bases his ruling of want of probable cause; but they are not bound by his inference from those facts. Malice must be expressly left to the jury. Damages may be given for: (1) personal detention; (2) expense in combating the charge laid; (3) injury to reputation. But damages in malicious prosecution do not include any sum for false arrest and imprisonment before a judicial officer was eised of the case.

FRANK E. HODGINS.

EQUITABLE ESTOPPEL.

Estoppel in pais or by conduct was a well recognized principle of our common law when Lord Coke wrote his admirable work on Littleton, in which he deals very generally with the whole subject as then understood. That branch of it, however, now known as equitable estoppel, or estoppel by representation, is of modern growth. It is true, expressions foreshadowing its underlying principles are to be found in the Equity Reports a century ago. Lord Chancellor Eldon, in 1801, and the Master of the Rolls, Sir William Grant, in 1805, enunciated the dictum, which they claimed was a very old head of equity, that if a representation be made to another, who deals upon the faith of it, the former shall make the representation good, if he knew it to be false. This doctrine, however, did not take definite shape until the distinctive enunciation made by Lord Denman, in 1837, in the leading case of Pickard v. Sears (*a*). The Chief Justice, in his judgment, laid down the following rule, which has passed as a settled principle into the general current of the common law, and has subsequently been applied to a great variety of cases: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

This principle enunciated in Pickard v. Sears was more broadly stated in the case of Gregg v. Wells (*b*). The Chief Justice in the latter case said: "A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." The

(*a*) 6 A. & E. 469.
(*b*) 10 A. & E. 90.

cases of Pickard v. Sears and Gregg v. Wells underwent further explanation in the case of Freeman v. Cook (*c*). In the latter case Parke, B., defines the force to be given the word "wilfully" in the judgment of Lord Denman in Pickard v. Sears. He says: "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

These three leading cases contain the general principles which underlie the whole doctrine of equitable estoppel. Subsequent cases are but applications of them to varying facts and circumstances.

Brett, L.J., in the case of Carr v. London and North Western Ry. Co. (*d*), thus groups the recognized propositions of equitable estoppel, which it is most important should be well fixed in the mind of the legal practitioner:

"One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement, is estopped from averring afterwards that such a state of things did not in fact exist."

"Another recognized proposition seems to be, that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and

(*c*) 2 Ex. 654.
(*d*) L. R. 10 C. P. 307.

it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him, who so believes, and acts, the first is estopped from denying the existence of such a state of facts."

"And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented."

"There is yet another proposition as to estoppel. If, in the transaction itself, which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist."

To which may be added the rule enunciated by James, L.J., in 1878, in Ex parte Adamson, In re Collie (*e*).

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do."

Because the estoppel may exclude the truth, by some it has been regarded with disfavour. Public policy in enforcing it proceeds upon the reasonable supposition that that is true which one has already admitted or declared to be true. Or, in other words, one should not be permitted to take advantage of his own wrong to the detriment of another. Allegans contraria non est audiendus. The party who resorts to the

(*e*) L. R. 8 Ch. D. 807.

rule is presumed to be desirous of excluding the truth. Doubtless there are many cases in which one is prevented from setting up the truth, when in contradiction to his former acts and allegations. Yet, as we have no absolute standard of certainty by which we may determine truth from falsehood, sound policy would suggest the rule a wise one, which takes that for truth which one has solemnly declared, or by his conduct implied, to be the truth, and that he should be estopped before the country and precluded from falsifying his former representation.

As late as 1878 Lord Justice Bramwell said: "Estoppels are odious, and the doctrine should never be applied without a necessity for it" (*f*). Coke also called estoppels odious, although he regarded them as "an excellent and curious kind of learning."

Equitable estoppels, however, are growing constantly in importance, and are becoming to be regarded with favour by the Courts. Lord Blackburn, in his judgment in the case of Burkinshaw v. Nicolls (*g*), says: "Now, sometimes there is a degree of odium thrown upon the doctrine of estoppel. . . . But the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered."

For the sake of convenience, this branch of estoppel has been divided into three classes: (1) Estoppel by statement; (2) Estoppel by conduct; (3) Estoppel by negligence. It has been held, the statement or misrepresentation must be of existing facts, and not a mere intention. It likewise must be material. In Smith v. Kay (*h*) the House of Lords acted on the rule, that if a person has practised a deception with the view to a particular end, which has been attained by it, he cannot be heard to deny its materiality. The misrepresentation, too, must have been made with knowledge of the facts. The party to whom made must have been ignorant of

(*f*) Baxendale v. Bennett, L. R. 3 Q. B. D. 529.
(*g*) L. R. 3 App. Cas. at p. 1026.
(*h*) 7 H. L. C. 750.

the truth of the matter. Likewise, it must have been made with the intention the other party should act upon it, and the other party must have been induced to act upon it.

In estoppel by conduct there are four distinct classes: (1) By silence. Under this head one is estopped because he did not speak when he ought to have spoken. (2) By representations known to be false. Here he is estopped because he has spoken what he knew to be false. (3) By representations of facts peculiarily within the knowledge of the person making them. He is estopped in this case because knowledge is conclusively presumed from the nature of the facts misrepresented. (4) By representations designed to influence the conduct of another. He is estopped, because he who makes a representation and leads another to act therein should make it good.

A good illustration of estoppel by silence is found in the case of Ramsden v. Dyson (*i*). Lord Chancellor Cranworth thus lays down the law: "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

So, in the case of Gregg v. Wells, already referred to, it was held that the owner of the goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bona fide*, cannot recover them from the vendee.

Young v. Grote (*j*) is a good illustration of estoppel by negligence. When Young went away from home he used

(*i*) L. R. 1 H. L. p. 129.
(*j*) 4 Bing. 256.

to leave blank cheques signed for Mrs. Young to fill up according to the exigencies of his business. One of these she filled up so clumsily that it was altered to a much larger amount by her husband's clerk. On these facts the plaintiff was held estopped by his negligence from throwing the loss on the bankers.

In the case of Baxendale v. Bennett (*k*), a bank acceptance had been stolen from the acceptor and filled up, and in this state came into the hands of an innocent holder. It was held the loss should not fall upon the acceptor. Young v. Grote was distinguished by Bramwell, L.J., from this case on the ground that in the former case the party had voluntarily parted with the instrument, while in the latter it had been got from him by the commission of a crime. It is needless to say the negligence must be the proximate or effective cause of the fraud.

Equitable estoppel had its origin in the sound principle that no man ought to allege anything but the truth for his defence, and what he has alleged once is presumed to be true, and therefore he ought not to contradict it.

One of the strongest objections urged against it is, it excludes *locus penitentiæ*. The answer is that, in the public interest, good faith, fair dealing and truth should obtain in all transactions between man and man; and experience has led to the conclusion that this end is best attained by holding that where one has received injury from the misrepresentation of another, the latter should be estopped from falsifying his own record.

SILAS ALWARD.

St. John, N.B.

(*k*) 3 Q. B. D. 523 (1878).

EDITORIAL REVIEW.

Ontario Legislation, 1898.

The legislation of the year is practically, or we should say relatively, nothing. And we are happier for it. This is not the editorial "we," but the "we" of the profession, the "we" of the public. Much law, many offences.

For the first time in many years we are able to spend the summer without conning and trying to interpret a host of new laws. And for the first time for many years our readers are spared the reading of extensive criticisms in our August number. The promise of an equally small volume of statutes for the latter half of the year bids fair to become a reality.

It is true that the Municipal Act has been amended; so has the Assessment Act; so has the Division Courts Act; without which amendments a volume of statutes might be hard put to establish its identity. With these there is no difficulty in recognizing the production as genuine.

And yet one important statute does appear, that respecting the garnishment of the salaries of civil servants. The policy of protecting Crown servants has been wholly departed from, by rendering their salaries liable to the demands of their creditors. Probably some question may arise as to what persons are within the Act. A wholesale description has either intentionally or accidentally been avoided. It applies to "any officer, clerk or messenger or other employee." If the canon of interpretation usually employed to ascertain the meaning of the concluding words be employed here, it will narrow the significance of the general expression down to persons of the same character as "officer, clerk or messenger." If it be said that these expressions are wide enough to include all classes of employees, why have enlarged upon them? But it is clear that they do not include all employees, for a special clause follows, extending the meaning to include all officers, clerks and employees attached or belonging

to the offices of the Courts mentioned in section 32 of the Public Service Act. As this section specially mentions certain officers only, all other employees attached to the Courts not specially mentioned are necessarily exempt. If this is any key to the interpretation of the beginning of the section the expression "officer, clerk or messenger" has a very narrow meaning.

But, taking the words as they stand, a peculiar result is arrived at. For instance, messengers are not mentioned in section 32 of the Public Service Act. Therefore, "officer, clerk or messenger" does not include "messenger" at Osgoode Hall. Nor does it include many officials who are undoubtedly "clerks," but are not mentioned in that section.

It would be a peculiar state of affairs, if clerks and messengers at Osgoode Hall, who are attached to the Attorney-General's Department, and are not mentioned in section 32 of the Public Service Act, should be exempt from the Act in question, but clerks and messengers in the Parliament buildings attached to the same Department should be included. Yet that is the result of the wording of the Act. The expression "officer, clerk or messenger" includes persons mentioned in said section 32. Messengers are not mentioned in that section. Therefore, "officer, clerk or messenger" does not include messenger at Osgoode Hall. But it must include messenger at the Parliament buildings, because "messenger" is specially mentioned, or, it must not include messenger, because the expression is defined elsewhere in the section. This latter alternative would be rather absurd, and we may therefore assume that some messengers are and some are not affected.

The procedure is unique. A judgment creditor may serve a notice upon the Treasurer or officer appointed to receive notices, which shall have the effect of stopping all debts "then owing" from the Crown to the employee, or a sufficient amount to satisfy the creditor, to the same extent as a garnishing order. The Treasurer may then pay the creditor or the sheriff, or may pay the amount into Court. Pausing here, there are several things to be remarked. First, the

notice attaches all "debts then owing from the Crown to the employee." Assuming that the remuneration of a Crown servant is a "debt," the notice will attach only the debts "then owing." Salary payable on the fifteenth of the month is not "owing" on the fourteenth. If "owing" is equivalent to "due," and "due" to payable, the creditor will be in the same position as the creditor of a landlord who attempts to garnish rent. The attaching order does not bind it until it is due, and if paid promptly, or before it is due, it cannot be attached. In other words, rent must be overdue to be subject to attachment. Now, Crown salaries are paid promptly when due. If this section is to be interpreted on ordinary principles the attaching notice will be too soon if served the day before salaries are payable, and too late, in all probability, if served on the day of payment. Even if the salaries were treated as accruing from day to day, as interest, rent, etc., are for the purpose of apportionment, it would not suffice, for in such case attaching orders do not avail unless there are "debts," that is, "money owed"—the past tense—money overdue. The second section expressly says "any debt due," and "due" is derived from the past participle of the French devoir. If the intention had been to divert the salary from the employee to the creditor, it would have been easy to say that the salary accrued and accruing should be attached. But the ordinary language used with regard to other attaching process has been used here and the third section concludes with a clinching expression, "to the same extent as a garnishing or attaching order issued by or from a Court of law." The notice is merely substituted for the attaching order, and where an attaching order would be effective or ineffective there the notice will succeed or fail. Perhaps no more was intended than that Crown salaries should be in the same position as other salaries, and, if so, the intention seems to have been well expressed.

Secondly, the notice attaches "subject to the rights of other parties." Does this mean that other creditors are to share under the Creditors' Relief Act? If so, why should the Treasurer retain only enough to satisfy the debt with respect

to which the notice is served? If the attaching creditor, on the other hand, is to share with other creditors, the amount sufficient to satisfy him will not satisfy him unless the Treasurer keeps on "retaining" while rateable distribution goes on, until he has retained enough to satisfy the judgment, i.e., until he has retained enough to pay all creditors in full. On the other hand, however, the Treasurer may pay the creditor, in lieu of paying the sheriff, who would hold subject to the Creditors' Relief Act; which seems to indicate that the Treasurer may ignore the Creditors' Relief Act and satisfy the particular debt. And yet he does so "subject to the rights of other parties."

Where judgment has not been recovered the notice has the same effect, but it must also be served on the employee. And the parties may, if the debt is disputed, consent to have the Treasurer determine the matter, or the Treasurer may require an action to be brought. Curiously enough, nothing is said as to payment in this case, the draftsman contenting himself with saying that the Treasurer shall retain any money due to abide the result of the action, or sufficient to pay any claim and costs!

Chapter 15, amongst other things, provides that no action shall be brought in a Division Court upon any judgment or order for the payment of money made by the High Court or County Court, where execution might issue thereon. This will put an end to those vexatious actions especially brought in the Division Courts for the purpose of obtaining the advantage of the harassing process of these Courts for compelling payment. Creditors have heretofore cheerfully abandoned the excess over jurisdictional amounts in order to force payment of the smaller sums. But this enactment puts an end to a practice which though settled by judicial decision has not been doubted by good lawyers.

Succession Duty on Foreign Assets.

In the case of Re Renfrew Estate, 18 Occ. N. 194, which we commented on, ante, p. 88, the Divisional Court has given judgment affirming Judge McDougall's decision. Two important questions were raised on the appeal. One, whether the Surrogate Court Judge has power to decide whether an

estate is liable to succession duty, and the other, on the merits of this case, whether foreign assets are to be taken into consideration in computing the total value of the estate.

The first is of more importance than at first sight it would seem to be. It leaves it in the hands of the Surrogate Judges practically to determine most difficult questions arising on an Act very obscure in some parts, and makes a Divisional Court the final Court of Appeal. But it is not particularly this arrangement that is of importance. It is rather the mode of procedure under the Surrogate Courts Act which supplies a way of arriving at values, etc., which the Succession Duty Act is defective in. By the 5th section, the executors or administrator, on applying to the Surrogate Court, must lodge an itemized inventory of the property and a statement of the persons to whom the same will pass and their relationships to the deceased. No provision is made for calculating the amount of duty, or determining whether the estate is liable to duty or whether some interests are and some are not assessable. It is only under section 6, when the Treasurer of the Province is not satisfied with the value sworn to, that the Surrogate Registrar and sheriff set to work to appraise the property and fix the various estates and interests liable to duty and value them. For instance, an estate may be sworn at $150,000, but it may be left in such a way that some part is to be enjoyed presently, while another part is to be enjoyed in futuro, and still another is contingent, and there may ultimately be an intestacy if the contingency does not happen. No provision is made for computing the duty on these. But if the Treasurer is dissatisfied with the value sworn to, and thinks the estate is worth $160,000, then, and not before, are the sheriff and Surrogate Registrar to fix the value of all present and future estates, contingencies, etc.

The result of the decision in question is to enable the Surrogate Court Judge to enter upon all these matters. By section 18 of the Surrogate Courts Act, the Surrogate Judge is to determine all matters relative to the granting of probate and letters of administration, and as the determination of whether the estate is liable to succession duty or not, and if so how much, in order that security may be fixed, are all

questions necessary to be passed upon before the grant of letters, the Surrogate Court Judge has jurisdiction to determine them all.

Upon the merits of this case there is little to be said. We have before pointed out that no Act of the kind is interpreted to include foreign assets for any purpose. It is impracticable. And Mr. Justice Street points out one absurdity of so contending, viz., that a contingent or future interest is to be valued according to the tables of mortality used by the Provincial Inspector of Insurance. And if a legatee resided in the tropics, the value of his future interest would be computed upon tables most unfavourable to him and compiled upon statistics collected in temperate climates.

Taken altogether, the Act presents so many difficulties in interpretation that it might with great advantage to all persons concerned be entirely repealed, and its place be supplied by an act to levy a duty upon the net value of the estate, without regard to the interests or estates taken by legatees.

THE

CANADIAN LAW TIMES.

SEPTEMBER—OCTOBER, 1898.

NOTES ON THE LAW OF COSTS AS BETWEEN SOLICITOR AND CLIENT.

I. THE rights of solicitors against their clients are regulated by the Act respecting Solicitors, R. S. O. c. 174, s. 34, et seq., and the rules framed under the authority conferred upon the Judges by the Act.

Solicitors, being officers of the Court, are also subject to the summary jurisdiction of the Court. The extent of this jurisdiction is somewhat uncertain, and is discussed later.

Section 34 provides that no action shall be brought by a solicitor for his fees until one month after a bill has been duly rendered in the manner prescribed by the statute. The only exception to this provision is contained in section 44, which empowers a Judge to allow an action to be brought within the month where the client is about to quit Ontario.

Though the solicitor cannot bring an action to enforce payment of his bill within this period, he is nevertheless a creditor of his client (*a*), and as such may bring an action to set aside a transaction by the client as being a fraud upon his creditors (*b*).

The solicitor is only prohibited from bringing an action for his fees, etc., he can, therefore, take proceedings upon any securities given to secure his account (*c*), and may bring an action on a note given him on account of his costs (*d*), and

(*a*) MacPherson v. Tisdale, 11 P. R. 261.
(*b*) Scane v. Duckett, 8 Ont. R. 370.
(*c*) Thomas v. Cross, 11 L. T. 430.
(*d*) Jeffreys v. Evans, 14 M. & W. 210.

may set off his costs in an action brought against him by his client (*e*).

The Act only applies to an action for "fees, charges and disbursements"; hence a solicitor may sue for advances made on account of his client without rendering a bill. As to what are disbursements and what advances see Re Remnant (*f*).

II. *The Bill.*—To comply with the statute the bill must contain detailed items showing the nature of the services charged for, and the amount charged for each item. A bill showing in detail the services charged for, but making a lump charge is not sufficient. There must be enough stated to enable the client to obtain advice as to the reasonableness of the bill.

Formerly a bill was required to show the Court in which the business was done so as to enable the client to obtain a reference to the proper officer, but probably this is not now necessary (*g*).

An item such as "attending a great many times" is too vague (*h*). Taxed party and and party costs cannot be inserted as a lump sum (*i*). Agency fees must be given in detail (*j*).

When a bill has been referred for taxation, and a lump charge has been made, the solicitor may upon the taxation bring in a statement in detail, but he cannot increase the amount charged. If, before the taxation, the solicitor has given the client a detailed explanation of the charge he is bound by that statement (*k*).

When an action has been brought upon a bill part of which complies with the statute, and part of which does not, the better view would seem to be that the bill is divisible, and

(*e*) Brown v. Tibbits, 31 L. J. C. P. 206.

(*f*) 1 Beav. 603; Re Lamb, 23 Q. B. D. 5.

(*g*) Wilkinson v. Smart, 33 L. T. N. S. 573; Blake v. Hummell, 51 L. T. N. S. 430; Pigott v. Cadman, 1 H. & N. 837.

(*h*) Re Pender, 10 Beav. 390.

(*i*) Drew v. Clifford, 2 C. & P. 69.

(*j*) Re Pomeroy, L. R. (1897) 1 Ch. 284.

(*k*) Re Tilleard, 32 Beav. 476; Re Russell, 55 L. T. N S 71; Re Mowat, 17 P. R. 180.

that the plaintiff can recover for part (*l*). But authority is not wanting to show that in such case the bill is entire, and not being duly delivered the plaintiff fails altogether (*m*); and certainly, according to the last case, the time within which the bill can be taxed does not begin to run till the items of lump charges are supplied.

The insertion of matter not properly chargeable does not vitiate the delivery (*n*).

An agreement between the solicitor and his client fixing the amount of the remuneration will not dispense with the delivery of a bill unless the agreement is one relating to matters falling within the provisions of section 54 and is in writing (*o*).

The bill must show upon its face, or by letter accompanying it, the party who is charged (*p*).

Scandalous matters may be struck out of a bill (*q*).

The bill or a letter accompanying it must be signed by the solicitor, his executor, administrator or assignee, or in case of a partnership, by one of the partners, either in his own name or the firm name, and must be delivered to the party to be charged therewith, or be sent by post to, or left for him at, his place of business or abode (*r*).

III. *Taxation at the Instance of the Client.*—After a bill has been delivered the client has the absolute right within a month from delivery to obtain an order upon præcipe for its taxation (*s*).

Where a bill has been delivered more than a month and less than a year, the Court may, upon the application of either party, refer it for taxation, and may impose such terms

(*l*) Blake v. Hummell, 41 L. T. N. S. 430; Waller v. Lacy, 1 M. & Gr. 54; Cook v. Gillard, 1 E. & B. 26.

(*m*) Ivemay v. Marks, 16 M. & W. 548: Pigott v. Cadman, 1 H. & N. 837; Re Pomeroy, L. R. (1897) 1 Ch. 284.

(*n*) Pilgrim v. Hirschfeld, 12 W. R. 51.

(*o*) Wilkinson v. Smart, 33 L. T. N. S. 573; Philby v. Hazle, 8 C. B. N. S. 647.

(*p*) Girdley v. Austin, 16 M. & W. 504.

(*q*) Re Miller, 54 L. J. Ch. 205.

(*r*) Sec. 34.

(*s*) Sec. 35; C. R. 1184.

as may be deemed proper (*t*). This order is obtained upon an application in Chambers; and may be granted ex parte if there are no facts in dispute, but the better, and usual, practice is to give notice (*u*).

After twelve months, or after verdict or judgment, the client can only tax upon proving special circumstances to the satisfaction of the Court (*v*).

When a bill has been paid there is no right to tax (even within the twelve months) unless upon an application within twelve months after payment in the opinion of the Court, "the special circumstances of the case appear to require" a taxation (*w*).

Many a bitter contest has been waged over these words, "special circumstances." The earlier cases indicated that the client must show some special iniquity in the bill—"gross overcharge amounting to fraud"—or some particular misconduct in the course of the litigation, or in the obtaining of payment; but in Re Cheeseman (*x*) the Court of Appeal adopt a more liberal rule: "The Court has got out of the narrow groove, laid down by some of the earlier cases, which decide that there must be pressure and overcharge or overcharge so gross as to amount to fraud, and it is now settled that each case must stand upon its own circumstances. The Court cannot lay down a hard and fast rule not imposed by the Act; it must judge in each case whether there are special circumstances, such as make it right and reasonable that the bill should be taxed" (*y*).

The question, then, comes to be one in the discretion of the Judge before whom the motion comes, and an appellate Court cannot interfere unless it is clear that the discretion has been improperly exercised (*z*).

(*t*) Sec. 36; Re Macdonald, 13 P. R. 227.
(*u*) Re Fitch, 2 C. C. 288.
(*v*) Sec 37.
(*w*) Sec. 49.
(*x*) L. R. (1891) 2 Ch. 289.
(*y*) Re Butterfield, 14 P. R. 149.
(*z*) Re Cheesman, *supra*.

The largeness of the bills, blunders in making them out, extraordinary charges requiring special explanations to justify them, are instances of special circumstances (*a*).

The special circumstances relied upon must be definitely charged and proved in the material upon which the motion is based, and if overcharges are relied upon they must be pointed out (*b*). In the latter case, Bowen, L.J., in a dissenting judgment, thought it was not necessary to point out overcharges where the whole bill was "redolent of overcharge."

The continuation of the relationship of solicitor and client is not in itself a special circumstance, but is a factor to be considered (*c*).

Taxation of One of Several Bills.—There seems to be no reason why a client should not tax one of several bills if he waives his right to tax the others, so that no difficulty will arise upon the taking of the account (*d*), and the Court has power to refer part of a single bill in a proper case (*e*). The objection based upon the old rule as to the incidence of the costs of taxation is now no longer of weight.

Several Clients.—Where a bill is rendered to several clients, an order cannot be obtained upon præcipe by one of such clients, but all must join in the application. If one client desires to tax he must make special application upon notice to the others (*f*); and when one client admits and another disputes the retainer a special order should be made as in Re Macdonald (*g*). Where the retainer is joint, there can only be one taxation, and all the clients must be parties; when the retainer is separate each client has the right to tax but all should be notified so as to be bound by the taxation (*h*).

(*a*) Re Norman, 10 Q. B. D. 673; Re Walker, 10 P. R. 400.
(*b*) Re Gildersleeve, 6 P. R. 117; Re Chisholm, 16 P. R. 162; Re Boycott, 29 C. D. 571.
(*c*) Read v. Cotton, 3 P. R. 118; Re Butterfield, 14 P. R. 149.
(*d*) Re Ward, L. R. (1896) 2 Ch. 31.
(*e*) Re Johnson, 37 Ch. D. 433.
(*f*) Re Beecher, 2 C. C. 215.
(*g*) 16 P. R. 498.
(*h*) Re Salaman, L. R. (1894) 2 Ch. 201.

Payment to Preclude Taxation.—The giving of a bill of exchange or promissory note in settlement of a bill of costs is not such a payment as will preclude taxation, unless it is shown that it was agreed that the giving of the bill or note should have that effect, and that the client understood and assented to this arrangement, the onus of establishing such agreement being on the solicitor (*i*).

It frequently happens that a solicitor and his client adjust their accounts without a formal bill having been delivered; a lump sum being allowed for costs, and the balance being paid over. The rights of the parties under these circumstances have given rise to much discussion, but it must be regarded as being now definitely determined that notwithstanding such settlement the client is entitled to a detailed bill, and to tax such bill, and that no lapse of time bars such right; though the Court probably has a discretion to refuse to make an order where there has been great lapse of time, and the solicitor shows that he cannot now prepare a detailed bill (*j*). Where, however, after such retainer or settlement the solicitor renders a bill, and the client acquiesces in it, such delivery relates back to the settlement, which is then regarded as payment (*k*). In Hitchcock v. Streeton (*l*), Stirling, J., refused to order taxation where the bill was not delivered until after the client had made an application, because no overcharge was shown (*m*).

After the lapse of twelve months from payment of a bill the Court has no power, in the absence of fraud, to tax (*n*). Where there is fraud the Court will exercise its summary jurisdiction over the solicitor as an officer of the Court.

IV. *Form and Effect of an Order for Taxation.*—Forms of orders are provided by the rules (*o*), simply directing delivery of the bill, and referring it for taxation. This is a

(*i*) Re Romer, L. R. (1893) 2 Q. B. 287; Sayer v. Wagstaff, 13 L. J Ch. 461.

(*j*) Re Baylis, L. R. (1896) 2 Ch. 107.

(*k*) Re Thompson, L. R. (1894) 1 Q. B. 464.

(*l*) L. R. (1892) 2 Ch. 342.

(*m*) See, however, the comments on this case in Re Thompson, *supra*.

(*n*) Re Sutton, 11 Q. B. D. 377; Re Jackson, 4 Ch. D. 954.

(*o*) Nos. 99, 100 and 101.

short form provided for convenience. Its extended effect is given by C. R. 1186. Where for any reason these provisions are inapplicable a special application is necessary, and the order may be modified to meet the particular case. Formerly the effect of the order depended upon whether it was issued by the client or by the solicitor, but the distinction has been abolished by C. R. 1186.

The provisions implied in an order in common form are :

(a) The taxing officer shall take an account of all moneys received for or on account of the client;

(b) The taxing officer shall award and tax the costs of the reference and certify the balance due.

(c) No action is to be commenced or prosecuted pending the reference without leave of the Court or a Judge. (See also section 35.)

(d) The certificate of the taxing officer is to be filed and confirmed as in the case of a Master's report, and the balance is payable forthwith after confirmation.

(e) Upon payment to the solicitor of the amount due to him he is to deliver over all papers.

Where the client does not apply for taxation the solicitor may issue a præcipe order after the expiration of a month from the delivery of the bill. C. R. 1184.

Account.—Under this order the taxing officer has jurisdiction to determine, and must determine, all questions of account arising between the solicitor and client, including all questions of agreement, settled account, etc. (*p*). The account extends not only to all sums of money received by the solicitor in his professional capacity, but to all moneys which the client might set off if sued by the solicitor for his bill (*q*).

Retainer.—Where a client obtains an order to tax he admits retainer in respect of the matters charged "to some extent," but it is open to him to dispute retainer as to particular items or classes of items (*r*). Where several distinct bills are referred the client admits retainer "to some extent"

(*p*) Re O'Donohoe, 14 P. R. 317 ; 19 S. C. R. 356.
(*q*) Re LeBrasseur, L. R. (1896) 2 Ch. 487.
(*r*) Re Herbert, 34 Ch. D. 504 ; Re Jones, 36 Ch. D. 105.

with respect to each bill (*s*). If the client wishes to dispute the retainer in toto in the taxing office, or to reserve that question for trial, he can in England obtain a special order reserving such right (*t*). In Ontario he cannot obtain such an order, but must await suit (*u*). Where the application to tax is made by the solicitor the question of retainer is open as to the whole bill (*v*).

The wording of the present rule (C. R. 1184) may, however, confine the right of a solicitor to tax to cases where his retainer is not disputed.

Negligence.—The taxing officer must also determine all questions of carelessness, impropriety or negligence in the conduct of the business (*w*). And he should disallow the costs of all proceedings in an action which was rendered useless by the negligence or ignorance of the solicitor, but if the negligence goes to the loss of the whole action he ought not to disallow the costs, but leave the client to bring an action of negligence against the solicitor (*x*).

Interest.—The taxing officer cannot charge the solicitor with interest upon the moneys in his hands (*y*), nor can he allow the solicitor interest without a special order (*z*).

The Statute of Limitations.—The client cannot, without a special order, set up the Statute of Limitations (*a*).

Amending Bill.—A solicitor cannot, without leave, amend his bill, but upon special application for that purpose he will be allowed to add items clearly shown to have been omitted by mistake upon proper terms as to costs (*b*).

Costs of Taxation.—The costs of proceedings for the taxation of solicitors' costs formerly were regulated by sections

(*s*) Re Frape, L. R. (1894) 2 Ch. 290.

(*t*) Re Pyne, 5 Ch. D. 407; Re Thurgood, 19 Beav. 541.

(*u*) Re Totten, 27 U. C. R. 449.

(*v*) Re Jones, 36 Ch. D. 105; Re Macdonald, 16 P. R. 498; Re Miller, 12 P. R. 155.

(*w*) Re Miller, 12 P. R. 136.

(*x*) Re Massey, 26 Ch. D. 459.

(*y*) Re O'Donohoe, 12 P. R, 612.

(*z*) Re McClive, 9 P. R. 213.

(*a*) Re Margetts, L. R. (1896) 2 Ch. 263.

(*b*) Re O'Donohoe, 14 P. R. 571; 15 P. R. 93; Re Martin, 7 P. R. 90.

35 and 36 of the Solicitors' Act, R. S. O. [1887] c. 147, which made the costs depend upon whether one-sixth were taxed off the bill or not. In 1895 these provisions were repealed in so far as they relate to the costs of the reference, and these costs are now discretionary (*c*).

Sometimes questions of difficulty arose in determining whether a particular item should be included in the bill as a cash disbursement or in the account, this often having an important bearing on the question of a sixth. Probably this is not a matter of importance now (*d*). Re Remnant and Re Lamb (*e*) show the principle acted on.

Where the bill is taxed by a third party, the costs of the reference cannot be set off against the balance due, as the balance and the costs are not payable between the same parties (*f*).

A solicitor on the question of the costs of taxation is entitled to the benefit of an absolute unequivocal and unconditional reduction of his bill (*g*). Probably the discretion of the taxing officer under the Act of 1895 would be influenced by an offer falling short of this.

Place of Taxation.—Under sec. 35 the bill is to be referred to the "proper officer of any of the Courts in the county in which any of the business charged for was done"; and unless a special application is made must be to the proper officer for the county in which the solicitor resides (*h*); but the place of reference is in the discretion of the Court and in proper cases the reference will be ordered to some other place if any of the work was done there so as to give jurisdiction to so order (*i*).

Counsel Fees Only.—Although the Act purports to apply to solicitors, a bill consisting of counsel fees only can be taxed (*j*).

(*c*) 58 Vict. cap. 13, sec. 37; C. R. 1185 (6).
(*d*) Re Remnant, 11 Beav. 603.
(*e*) Re Lamb, 23 Q. B. D. 5.
(*f*) Re Rogers, 14 P. R. 38.
(*g*) Re Allison, 12 P. R. 6.
(*h*) C. R. 1187.
(*i*) Re Skinner, 13 P. R. 447.
(*j*) Re Crooks, 6 P. R. 226.

V. *Retainer.*—The contract of the solicitor upon a retainer in a common law action is an entire contract. The solicitor cannot terminate the contract before completion, except for good cause and upon reasonable notice. The refusal of the client to supply funds for disbursements would constitute sufficient cause, but the client must be given such notice as will enable him to make other arrangements for the protection of his interests. If the solicitor refuses to act without good cause, and sufficient notice to the client, he cannot recover in respect of the services rendered (*k*). In equity cases the rule is different. In the long and often complicated procedure incident to such actions, certain definite stages occur, and the law regards each of these stages as in itself a separate proceeding, and the reasonable inference is that the solicitor may expect to be paid as the cause is advanced through these respective stages (*l*). It follows that in common law actions a solicitor has no right to deliver a bill until the completion of the cause, while in equity cases he has a right to do so, selecting natural breaks for the purpose, and it then becomes a question of fact in each case, when a series of bills has been delivered, whether the solicitor intended to avail himself of this right or whether the bills were sent as mere interim statements showing the position of the account. The onus is in each case upon the solicitor to show that a formal delivery was intended (*m*).

Where a series of bills are delivered under such circumstances that the client has the right to regard them as mere interim statements, the time within which the client may tax runs from the delivery of the last bill.

In ordinary cases a solicitor's retainer extends not merely to the recovery of judgment, but also to the taking of all necessary and proper steps towards obtaining the fruit of the judgment (*n*), but the solicitor is not entitled to enter upon

(*k*) Underwood v. Lewis, L. R. (1894) 2 Q. B. 306, C. A.

(*l*) Re Hall, 9 Ch. D. 538; Re Romer, L. R. (1893) 2 Q. B. 286.

(*m*) Re Romer, L. R. (1893) 2 Q. B. 286; Re Butterfield, 14 P. R. 149; Re Cartwright, 16 Eq. 469.

(*n*) Hett v. Pun Pong, 18 S. C. R. 290.

new proceedings, such as an interpleader issue, without obtaining further authority from his client (*o*).

VI. *Negligence.*—In undertaking a client's business a solicitor undertakes on his part for the existence and due employment of skill and diligence. Where an injury is sustained by the client in consequence of the absence of either, he is responsible to the client for such injury (*p*). This liability can only be asserted in an action. If the client receives no benefit whatever from the solicitor's services owing to his negligence or want of skill the taxing officer may disallow the whole charges; but if some benefit results to the client, the taxing officer must allow the charges, leaving the client to recover his damages by action (*q*). If in the course of an action certain proceedings are had or steps taken that, from lack of skill or diligence, avail nothing for the client, and are useless, the taxing officer can disallow the costs (*r*). When an action is improperly brought in a superior Court instead of an inferior Court, the solicitor will only be allowed to tax upon the scale of the inferior Court (*s*). When the claim is unliquidated and the proper forum is a matter of uncertainty, it is the duty of the solicitor to place the whole matter fully before his client and to allow him to determine the amount to be claimed (*t*).

The same principle is to be applied to the adoption of all unusual proceedings in the course of an action or the choice of an unusual method of procedure (*u*).

The Court of Appeal, in Re Blyth and Fanshawe (*v*), thus defines the solicitor's duty; Per Baggallay, L.J.:—"I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that, if an unusual expense is about to be incurred in the course of an action it is the

(*o*) Hackett v. Bible, 12 P. R. 483.
(*p*) Hart v. Frame, 6 A. & E. 193.
(*q*) Re Hardy, 3 C. C. 179; Re Massey, 26 Ch. D. 479.
(*r*) Re Baldwin and McGuire, 16 P. R. 248.
(*s*) Re Hardy, *supra*.
(*t*) See cases collected, 14 P. R. at p. 236.
(*u*) Re Allenby, 14 P. R. 236.
(*v*) 10 Q. B. D. 210.

duty of the solicitor to inform his client fully of it; and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will, or may, not be allowed on taxation between party and party, whatever may be the result of the trial." In the subsequent case of Broad v. Broad (*w*), Lord Esher in reference to the above says, "A more wholesome rule I never heard of" (*x*).

Instances of negligence where the solicitor was deprived of costs either in whole or in part.—Administration proceedings were commenced by writ instead of by summary application, without sufficient cause for taking this course. The extra costs were disallowed (*y*).

A solicitor brought three actions for three separate clients who ought to have joined in one action. The costs were allowed as of one action only (*z*).

The costs of a motion for judgment after appearance where the writ was clearly not specially endorsed were disallowed (*a*).

The costs of an attempt to prosecute an *apprentice* under an Act relating to *servants* were disallowed (*b*).

Where a solicitor knew that a commission was necessary to obtain the evidence of witnesses, yet he brought the action in an inferior Court which had no power to issue a commission, his costs were disallowed (*c*).

The costs occasioned by not filing a rejoinder in time were disallowed (*d*).

VII. *Journeys.*—The cases as to the right of a solicitor to charge for journeys seem to fall into two classes. Those in which the journey was under all the circumstances reasonable, and those in which the taking of the journey was

(*w*) 15 Q. B. D. at p. 421.
(*x*) See also Re Pender, 10 Beav. 390.
(*y*) Re Allenby, 14 P. R. 227.
(*z*) Re Butterfield, 14 P. R. 367.
(*a*) Baldwin v. McGuire, 16 P. R. 248.
(*b*) Hart v. Frame, 6 Cl. & F. 193.
(*c*) Cox v. Leach, 1 C. B. N. S. 617.
(*d*) Re Massey, 26 Ch. D. 459.

not necessary, as the work could as well have been done through agents.

As to the former, the solicitor will be allowed his charge upon proof of instructions given by his client; as to the latter, the solicitor must prove that he advised the client that the services could be as well performed by an agent, that the client still insisted that he should make the journey, and, if the journey be in the course of an action, upon the further proof that he warned the client that the extra costs would not be allowed as between party and party (*e*).

VIII. *Taxation apart from the Solicitors' Act.*—Solicitors being officers of the Court, the Court has general jurisdiction over them, and can order taxation of costs in proper cases apart altogether from the provision of the Solicitors' Act (*f*), and this jurisdiction enables a taxation to be ordered after the lapse of more than a year from payment, under special circumstances. This power was exercised where a solicitor had abused his influence over his client, and obtained an extortionate amount of costs from a client who acted without independent advice or sufficient information (*g*).

A client can bring an action against his solicitor for an account independently of the provisions of the Act (*h*).

IX. *Taxation at the instance of third parties.*—Sec. 45, et seq., of the Solicitors' Act authorize an application by any person who "not being chargeable as the principal party is liable to pay, or has paid, any bill either to the solicitor, his assignee or representative, or to the principal party entitled thereto," for the taxation of the bill; and (sec. 46) the Court may, where the bill is not taxable as of right, but only upon special circumstances being shewn, consider any special circumstances that may exist with regard to the applicant, but which would not apply to the client, were he the applicant.

(*e*) Crosley v. Parker, 1 J. & W. 460; Alsop v. Lord Oxford, 1 My. & K. 564; Horlock v. Smith, 2 My. & Cr. 495; Re Snell, 5 Ch. D. 815: Re Mowat, 17 P. R. 180; Gough v. Park, 8 P. R. 892.

(*f*) Stover v. Weatherall, 15 A. C. 203; Re Robinson, 17 P. R. 137; Re Park, 41 Ch. D. 326.

(*g*) Watson v. Rodwell, 11 Ch. D. 150.

(*h*) Spencer, Spencer v. Hart, W. N. (1881) D. 170.

The Court may order the solicitor to deliver a copy of the bill to the applicant (sec. 47); no bill previously taxed shall be again taxed unless under special circumstances (sec. 48). C. R. 1188 provides that where, upon an application by a third party, it appears that by reason of the conduct of the client the third party cannot obtain an order for taxation against the solicitor, but is entitled to an account against the client, the Court may in a summary manner and without action refer the bill for taxation and may add all parties necessary to do complete justice. Upon such reference the provisions of C. R. 1185 are to apply so far as they are applicable to the circumstances of the case. This rule was passed in 1888 and removes certain difficulties in working out the provisions of the statute where the client had precluded himself from taxing by paying the bill or otherwise.

In England there is the further statutory provision, not embodied in our statute, providing that beneficiaries may tax the bill of costs of the solicitors for executors and trustees in respect of the trust estate. There is no similar rule to our C. R. 1188.

Apart from statutory provision the Court cannot direct taxation at the instance of a third party (*i*).

In order that a third party may have the right to apply he must either be "liable to pay or have paid" the bill, either to the solicitor or to the client. It is not enough that he is interested in the bill, or that the payment of an excessive amount will prejudice him (*j*).

A mortgagor can tax the bill of the mortgagee's solicitor in respect of the mortgage security.

A surety who has agreed with a solicitor to guarantee payment by the client of his costs can tax. The assignee of the client for the benefit of his creditors can tax (*k*). An assignee of a mortgagor can tax the costs of the mortgagee's solicitor (*l*).

(*i*) Re Jackson, 40 Ch. D. 495.
(*j*) McGugan v. McGugan, 19 App. R. 56.
(*k*) Re Rogers, 14 P. R. 38.
(*l*) Re Allingham, 32 Ch. D. 36.

An attaching creditor, whose attaching order is subject to a solicitor's lien, can tax (*m*). A ratepayer has no right to tax the bill of the solicitor for a municipal body to whose funds he contributes (*n*). An order has been made at the instance of residuary legatees to tax the executors' costs, the omission of the provision of the English Act above referred to, not having been drawn to the attention of the Court (*o*). The right of a cestui qui trust to tax the costs of the solicitor for the trustee is also assumed but not discussed in Sandford v. Porter (*p*). Where an assignee is changed the new assignee has the right to tax the costs of the solicitor for the first assignee (*q*). Where, under an agreement, one party undertakes to pay the costs for which the other is liable to his solicitor, he has a right to tax such costs (*r*). A mere stranger voluntarily paying a bill has no right to tax (*s*).

When a third party taxes a bill, the taxation is for the purpose of ascertaining the solicitor's rights against his client, and not for the purpose of ascertaining the liability or rights as between the third party and the client. It may well be, that the solicitor is entitled to tax costs against the client which the client has no right to charge against the third party (*t*).

In England an exception to this rule has been established when the taxation is under the trustee and executor clause (*u*). It has not been determined whether under our Act a distinction can be drawn. Probably no ground exists for making such distinction, as bills of this class if taxable at all are taxable under sec. 45.

In cases falling under C. R. 1188 the Court can make the client a party to the proceedings and direct the taxing officer to take an account between the applicant and the client. It

(*m*) Gall v. Collins, 12 P. R. 413.
(*n*) McGugan v. McGugan, 19 App. R. 56.
(*o*) Re Skinner, 13 P. R. 276, 447; but see McGugan v. McGugan, 19 App. R. at p. 61.
(*p*) 16 App. R. 565.
(*q*) Re A. B., 6 P. R. 68.
(*r*) Re Newman, L. R. 2 Ch. 707.
(*s*) Re Beck & Flower, 5 Beav. 406.
(*t*) Re Newman, L. R. 2. Ch. 707; Re Robertson, 42 Ch. D. 553.
(*u*) Re Brown, L. R. Eq. 464.

is suggested that this power might be advantageously extended to all third party cases, as the taxing office is the best place to determine what should be allowed against the third party on an accounting between the client and such third party.

On taking accounts between a trustee and cestui qui trust, bills of costs paid by the trustee and sought to be allowed in his accounts may be referred to the taxing officer for moderation. Moderation may under circumstances warranting it be conducted as strictly as a taxation (*v*).

When a party to litigation agrees to pay the costs of an opposite party "as between party and party," these provisions do not apply, but the proper course is to obtain an order in the action for taxation (*w*), but where the agreement is to pay costs as between solicitor and client these provisions apply (*x*).

When a party has paid a lump sum in full of the costs of the opposite party, he cannot thereafter obtain an order against the solicitor for delivery of a bill and taxation (*y*); nor can the client thereafter tax his solicitor's bill, unless he shows that the solicitor took advantage of his position and obtained less for the client by reason of his own excessive demand (*z*).

When a bill has been paid by the client, and no special circumstances exist entitling the client to tax, the third party formerly was driven to an action against the client for an account (*a*); but now an application can be made against the client under C. R. 1188. An order may be made for delivery of a copy of a bill under sec. 47 without determining that there is a right to tax (*b*).

X. *Agreements as to the amount of remuneration.*—In England a client, whether acting on his own behalf or in a fiduciary capacity, may make an agreement in writing for the remuneration of his solicitor, either by payment of a gross

(*v*) Re Hague, 12 P. R. 119.
(*w*) Re Gundy, 17 Ch. D. 108.
(*x*) Re McCarthy, 15 P. R. 261.
(*y*) Re Heritage, 3 Q. B. D. 726.
(*z*) Holtditch v. Carter, 3 P. & D. 115.
(*a*) Re Macdonald, 8 P. R. 88; Re Cronyn, 8 P. R. 372.
(*b*) Re Moffatt, 12 P. R. 240.

sum, commission, percentage or salary, subject to the supervision of the Court, for the purpose of protecting the client from unfair bargains.

The Imperial Act 33 & 34 Vict. cap. 28 (1870), as amended by 40 & 41 Vict. cap. 25, applies to litigious business; and the Imperial Act 44 & 45 Vict. cap. 44 (1881), to conveyancing business.

By the Conveyancing and Law of Property Act of 1886, most of the provisions of the English Act of 1881 were introduced into Ontario, and by the terms of this enactment this right was conferred as to costs in conveyancing transactions. In the revision of 1887 this enactment was torn from the context and placed at the end of the Solicitors' Act, but the wording was not modified to make it clear whether it was intended to make the provisions of general application or not; but in Re Ford & Mason (*c*), it was determined that the Statute still only applied to conveyancing costs. See now sec. 54.

Apart from special legislative enactment, an agreement for remuneration of a solicitor in any other way or upon any scale other than that provided by the tariff is void (*d*).

An agreement to employ a solicitor at a salary is valid, apart altogether from the provisions of the Act (*e*).

XI. *The Tariff and Solicitor and Client Taxation.*—The tariff is conclusive as to all items therein provided for (*f*). Throughout the tariff, provisions appear empowering the taxing officer at Toronto to grant increased fees. These provisions apply to party and party taxations only, and local officers have upon solicitor and client taxation, power to allow (up to the maximum limit) full fees without fiat (*g*). Counsel fees as between solicitor and client have always been regarded as outside of the tariff (*h*).

(*c*) 16 P. R. 25.

(*d*) Philby v. Hazle, 8 C. B. N. S. 647; Re Geddes, 2 C. C. 447; Re Richardson, 3 C. C. 144.

(*e*) Falkiner v. Grand Junction Railway Co., 4 Ont. R. 350.

(*f*) C. R. 1178; Re Totten, 8 P. R. 385; Re Chapman, 10 Q. B. D. 54.

(*g*) Re Macaulay, 17 P. R. 461.

(*h*) Re Geddes v. Wilson, 2 C. C. 447; see, however, Re Crooks, 6 P. R. 226.

Non-litigious Business.—The right to order taxation of a bill for work not being business in any action or in any Court is in an unsatisfactory condition. The difficulties are pointed out in Ostrom v. Benjamin (*i*), but the Court are not agreed in the result.

Where a solicitor renders services of a class not falling within the tariff, in the absence of any specific contract, the general custom and practice of solicitors in such cases is to be a guide if any such custom exists; if not, the value of the services rendered is to be estimated on a quantum meruit. In collecting rent, selling land, etc., a commission is proper (*j*).

For mailing circulars a solicitor was allowed a nominal sum quantum meruit (*k*).

XII. *The Statute of Limitations.*—The Statute begins to run the moment when the work is complete, so that a bill can be rendered (*l*).

In ordinary litigation this is when judgment is entered; but where there is an appeal the time does not run until the end of the appeal (*m*).

The fact that the bill is not rendered until a later period is immaterial, as the plaintiff's cause of action is complete on the rendering of the services though the Statute makes the due rendering of the bill a month prior to suit necessary (*n*).

Though a solicitor's right of action is barred by the Statute, he retains his lien upon his client's papers (*o*). A client cannot avail himself of the Statute under the common order, but must obtain a special order (*p*).

The Statute of Limitations forms no bar to a summary application against a solicitor by a client in respect of moneys in his hands (*q*).

W. E. MIDDLETON.

(*i*) 20 App. R. 336.
(*j*) Re Richardson, 3 C. C. 144; Re Attorneys, 26 C. P. 495.
(*k*) Re Detton, 13 Ch. D. 318.
(*l*) Lizars v. Brown, 32 U. C. R. 3276.
(*m*) Harris v. Quinn, L. R. 4 Q. B. 653.
(*n*) Coburn v. Colledge, L. R. (1897) 1 Q. B. 702.
(*o*) Re Bromhead, 5 D. & L. 52; Higgins v. Scott, 2 B. & Ad. 413.
(*p*) Re Margetts, L. R. (1895) 2 Ch. 263; Curwen v. Milburn, 42 Ch. D. 424.
(*q*) Re Sharp, 1 Jur. 405.

EDITORIAL REVIEW.

Statute of Limitations—Arbitration—Acknowledgment.

A curious case under the statute arose in Fenner v. Lord, 14 T. L. R. 450. Two persons having accounts between them agreed to arbitrate for the purpose of ascertaining the amount due, and from which one to the other, several months before the Statute of Limitations would have barred the debts. Each agreed that he would pay the other the amount found due by the arbitrator, and also not to take any advantage of the statute. The arbitration proved abortive; the plaintiff then sued and the defendant set up the statute, which, but for the arbitration, would have run at the date of the writ. Phillimore, J., held that the submission to arbitration was not an acknowledgment. It was, according to His Lordship, a conditional agreement to pay, if the arbitration was held, the amount found by the arbitrators. The arbitration having proved ineffective, the condition on which the admission was made had not been fulfilled; therefore, there was no acknowledgment. This is rather like reading a condition into a contract. At first sight one would say that the submission was an acknowledgment or admission of a debt, amount uncertain, and a promise to pay something, whatever was found due to the person to whom it was found due. The arbitration being the mere process of ascertaining the amount does not necessarily constitute part of the admission or acknowledgment. Substitute for arbitration an action, and the admission of a debt remains, the process of ascertaining the amount alone being altered.

Sale of Goods—Warranty.

Two curious cases on this subject are reported this year. In Ashworth v. Wells, 14 T. L. R. 170, the defen-

dant sold to the plaintiffs an orchid which he warranted to be a very rare, if not unique variety. The plaintiff discovered, after some time, that it was a very common one worth very little, and brought an action. The sole question was the measure of damages, the defendant alleging that a restoration of the price paid, with interest, was the full measure or damages. The Court of Appeal, in sending the case back to a County Court, held that the true measure was not the difference between the contract price and the price at which it would then sell when its true character was discovered, but the difference in value of the thing sold with the defect warranted, and the value of the thing without the defect.

The other case is Howcroft v. Laycock, 14 T. L. R. 46. In this case the plaintiff sold some cabbage seeds to the defendant under a clause as follows:—"Messrs. —— give no warranty, express or implied, as to description, quality, productiveness, or any other matter connected with the seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned." The order was for a particular kind of seed, but it turned out when cultivated that it was a sort of tree-cabbage, fit only for making walking sticks. The plaintiff sued for the price of the seed. The defendant counter-claimed for breach of contract. The Court of Appeal said that when one kind of seed was ordered, the vendor had no right to deliver a totally different kind. The custom of a trade might qualify a contract, but could not destroy it.

Contract by Compulsion.

It is not often that a litigant undertakes the hazardous business of trying to compel his opponent to enter into a contract, in order that he may take the second step of enforcing the contract. But in Johnston v. Boyes, 14 T. L. R. 475, such an attempt was made. The plaintiff was the highest bidder at an auction sale, and the defendant declined to allow her to sign the contract, and would not accept the deposit. The action was for an injunction to re-

strain the defendant from selling to any one but the plaintiff, for a declaration that she was the purchaser, and to compel the defendant to accept her purchase money and allow her to sign the contract. Stirling, J., said that he had never met with such an action before, an action to enforce an agreement to enter into a contract for the sale of real estate. It was argued that the defendant should not be allowed to set up the Statute of Frauds, as it would result in making it an instrument of fraud. But the dilemma the plaintiff was in was this: if she had no contract, she had no interest in litigating, and the statute had nothing to do with it; if she had a contract, it was verbal only, and the statute was a defence.

A somewhat similar case occurred in Ontario: Brooks v. Conley, 8 Ont. R. 549. A verbal agreement was made between the plaintiff and defendant, adjoining proprietors of lands, by which a wall which encroached on the lands of the adjoining proprietor was allowed to be used by him as a party wall. This was sought to be put into writing by the plaintiff, whose land was burdened by the wall, so that he could have it registered, or that his rights might be declared. No declaratory judgment (without consequential relief) could then be given, and as to the claim to have the agreement put into writing the Chancellor said: "The plaintiff has no grounds for asking that the verbal agreement should be manifested in writing. The parties chose to deal on the footing of an oral bargain, and the Court cannot in this respect put either of them in a more advantageous position."

BOOK REVIEWS.

The Division Courts' Act, chapter 61, Revised Statutes of Ontario, 1897, carefully annotated; the new revised rules and forms, together with a review of the tariff of fees of clerks and bailiffs, with full instructions to the officers of the Courts on questions most frequently arising in the course of their duties. By W. H. HIGGINS, of the Department of the Inspector of Division Courts. Author of "The Division Court Handbook," etc., etc. Toronto: The Carswell Co. 1898.

While this book is a very full compilation of all information connected with Division Courts, it is a book rather for officials than for practitioners. The annotations do not comprise decided cases, but contain references to official duties, new legislation, the writer's opinion of the effect of certain sections, and cross-references.

Ontario Assignments Act, with Notes. By R. S. CASSELS, of Osgoode Hall, Barrister-at-Law. Third edition. Toronto: The Carswell Co. 1898.

Mr. Cassels modestly expresses the hope that in this edition his book will "to a greater extent than before answer its purpose of being an index to the authorities bearing upon the construction of the Act." We can answer for it that it not only fulfills that office, but goes further, and affords most valuable assistance to the practitioner throughout. We must repeat what we have said before concerning the book—that a more extended treatise would be most welcome. There are many portions which, from the condensation of the notes, do not give one the full notion of

the course of reasoning. These would well bear extending or enlarging on, and would obviate the necessity of constant reference to the reports.

The Conflict of Laws in the Province of Quebec. By E. LAFLEUR, of the Montreal Bar, Professor of International Law in McGill University. Montreal: C. Theoret. 1898.

This is a most entertaining little book on Private International Law as dispensed by the Courts of Quebec. It is the result of lectures delivered by the author at McGill University. While we miss an important case or two from the text, the excuse may be that it is the jurisprudence of Quebec that is being dealt with. It will repay any one who is entering on the study of international law to open his course by a perusal of this work.

The Local Courts Act and the County Courts Act. Being chapters 54 & 55 of the R. S. O. 1897, with cases applying thereto and notes. By R. S. ROBERTSON, of Osgoode Hall, Barrister-at-Law. Toronto: The Carswell Co. 1898.

All the decisions down to date affecting these Acts have been industriously collected and arranged by Mr. Robertson, making the work most useful to those who have business in the County Courts.

The Quebec Law Index, embracing all the legislation of the Province of Quebec from 1867 down to and including the year 1898. By HARRIS H. BLIGH, Q.C., Librarian of the Supreme Court of Canada, etc., etc. Montreal: C. Theoret. 1898.

Mr. Bligh's Indexes of Dominion and Ontario statutes are so well known and so useful that the Quebec Index ought to be immediately appreciated in the Province of Quebec.

Code Municipal de la Province de Québec. Annoté Texte Francais et Anglais. Par J. E. BEDARD, C.R., Avocat du Barreau de Québec. Montréal: C. Theoret. 1898.

The notes to the code seem to be very full; but being exclusively in the French language, though an English translation of the code itself is printed, they will not be readily or frequently referred to elsewhere than in Quebec. It is a pity that the notes are not printed in English as well, inasmuch as we frequently refer to municipal cases decided in other Provinces than our own. It is to be hoped that this will be a feature of the next edition.

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CANADIAN LAW TIMES.

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ON THE ORIGIN AND GROWTH OF CRIMINAL LAW.

"THE legal rule of to-day is the last link in an historical series." That our laws, in their present form, have their roots in the remotest past, and have been a gradual development from age to age, is a truth supported by such abundant and still-accumulating evidence that it cannot now be gravely questioned. That a process of evolution, or something akin to it, has taken place in the development of all human institutions becomes ever a more inevitable conclusion, as the universal testimony touching it continues to come in. That this process possesses an historical continuity, and has gone on "as if in obedience to a natural law," is the conviction of Spencer, Maine, Stubbs, Freeman, and other great students of human history. There has been an order and sequence of movement in the course of human progress, testifying that "the reign of law" is everywhere, and that the uniform action of "natural law" holds not only in the physical world, but throughout the whole range of human thought and experience.

In the history of criminal law this development may be perhaps more clearly traced than in any other department of jurisprudence, since wrongs or crimes claimed the attention of primitive man, long before he had begun to think of the possibility of contracts, or of legal redress for their violation.

The authorities agree that there have been three well marked stages in the evolution of criminal law: (1) The era of vengeance; (2) the stage at which vengeance is yielding

place to justice; (3) the time when justice comes to be seasoned by mercy and humanity. The first laws which man makes deal with murder and theft, and other offences against the rights of his fellow-man, which we now call crimes. For instance, the Anglo-Saxon laws show that in judicial proceedings the only topics of general importance dealt with in that period were man-slaying, wounding, and cattle-stealing. The gradual advance, from the crude customs of savage tribes, through many stages of progress, to the highly complex system of to-day, has left footprints on its way which we can still discover, and so retrace the path along which the development has come.

It was a saying of Plato that past time is the maker of states, and it is no less true that past time is the maker of laws. To put it in another way: laws are not made, they grow. "Formal legislation comes late in the history of most legal systems. Law is generated in other ways which seem irreconcilable with anything like legislation. No mental attitude is more common than that which regards law as a natural product, discoverable by a diligent investigator much in the same way as the facts of science or the principles of mathematics. The introductory portions of Justinian's Institutes are certainly written from this point of view, which may also be described, without much unfairness, as the point of view of German jurisprudence" (*a*).

"It is a matter of historical observation that long before any supreme political authority has come into being, a series of practical rules determine the main relations of family life, the conditions of ownership, the punishment of the more violent forms of moral wrongdoing, and the adjustment of contracts. The mode in which such rules are formulated seems to be the following: A spontaneous practice is first followed, and if good and useful is generally copied over and over again, the more so as habit and association always render the imitation of an old and familiar practice easier than inventing a new and untried one" (*b*).

(*a*) Art. Law, Ency. Brit. (1882).
(*b*) Amos, Science of Law, 49.

Law is evolved out of custom, which grows up spontaneously, takes form by degrees, and is ultimately crystallized in a written law. This process is manifestly the work of ages (*c*).

"Codes succeed customary law at certain stages of progress in each community. Laws engraven on tablets and published to the people take the place of usages" (*d*).

"The Roman Code embodied the existing customs of the Roman people" (*e*), and it is now well established that the laws of Solon and Lycurgus, and other famous law-givers of antiquity, were not laws originating with them, but codes, in which they consolidated the practices and customs of the people which they found established in their day.

So our own King Alfred "collected, it is said, the various customs that he found dispersed in the kingdom and reduced and digested them into one uniform system or code of laws in the Dom-bec or liber judicialis" (*f*).

The notion of justice has not yet dawned on the mind of the primitive man. If he were asked to define it his answer would resemble the Bechuana savage's reply to the traveller who has asked him his notion of goodness. When the question was put to him "at first he was much puzzled, but finally answered, 'to be good is to possess a wife and cows, and to steal one's neighbour's wife and cows.'" The savage's notion of law and justice correspond to his stage of mental development, and in these matters he has the mind of a child.

The conception of law is foreign to Homer. The later words for it (*nomos, retra*) are unknown, and the terms which he uses merely mean "custom" (*g*). Judicial func-

(*c*) There is also at times a relapse or reversion to primitive custom. An instance of this exceptional manifestation is seen in the practice of "lynching" which exists in the southern parts of the United States. It is a return to the primitive mode of administering justice under extreme pressure. So the civilized man is still known to avenge his own wrong at times when circumstances seem to excuse him.

(*d*) Maine's Ancient Law, 15.

(*e*) Maine's Ancient Law, 18.

(*f*) IV. Stephen Com. 478.

(*g*) *dike*, Homer's word for "custom," in later times came to mean law, order, right. *Dikesis* is "vengeance," and *dikephoros* "an avenger"; but in Plato's day *dikaiosune* has come to mean "justice," "righteousness."

tions are in the hands of the elders who "have to do with suits" and "uphold judgments." "On such matters as the compensation in cases of homicide, it is evident that there are no rules, but merely a feeling created by use and wont, that the relatives of the slain man should be willing to accept payment" (*h*).

The allusion here is doubtless to the trial scene on the shield of Achilles, to which reference is made hereafter. Possessing no notion of justice or law, neither has the savage any notion of crime in the modern sense. The idea of crime manifestly can only arise in a community possessing some degree of social organization and public opinion, and some dawning sense for law and justice. But what the savage does possess is a thirst for vengeance when he is wronged, and to gratify this is part of his religion. Vengeance is a religious duty. The man who fails to avenge his slain kinsman's death is dishonoured and disgraced in the eyes of gods and men. The Roman citizen who failed to avenge his kinsman's death could not share in his inheritance. "Among all primitive peoples there are certain offences against piety, especially bloodshed within the kin, which are regarded as properly inexpiable, the offender must die or become an outlaw. Where the god of the kin appears as vindicator of this law, he demands the life of the culprit. If the kinsmen refuse they share the guilt. Thus the execution of the criminal assumes the character of a religious action. If the true culprit cannot be found the kindred as a whole bear the guilt until they or the guilty man himself find a substitute" (*i*). Greek tragedy affords ample evidence of the existence of these principles. This vengeance is the root from which our criminal jurisprudence springs. "Criminal law is the part of justice evolved out of vengeance, which, from being with some animals and the lowest tribes a boundless passion, was by degrees restrained, acquired a definite form, and became the law of retaliation, "an eye for an eye and a tooth for a tooth" (*j*). Vengeance

(*h*) Art. Homer Ency. Brit. XII., 112.
(*i*) Ency. Brit. Art. Sacrifice.
(*j*) Ency. Brit. VIII, 624.

and justice are not distinguishable in the mind of the savage, he has one word for both, and "it would seem that the object of legal regulation was at first not so much to punish the offender as to restrain and mitigate the vengeance inflicted by the aggrieved party" (*k*).

With the primitive man the penalty of death was the usual and all but universal mode of vengeance or punishment for grave offences. The savage does not measure his blows. In a community advancing towards civilization it becomes necessary in the public interest to place this boundless passion under restraint; one consideration doubtless is that the whole fighting strength of the tribe is needed to meet external foes, and it is against the general interest of the community to waste it in internal disputes, so the "lex talionis" emerges. "The amount of legal revenge, if I may so call it, is often strictly regulated, even where we should least expect to find such limitations" (*l*). The transition is easy from exact retaliation to some mode of commutation, the practical difficulties of administering the lex talionis in the case, for instance, of a one-eyed or toothless man would be great. In the Anglo-Saxon Laws of King Ine there is a complete tariff of prices for every offence from the slaying of an "ealdorman" down to striking off the nail of the little finger of an ordinary citizen, the price of which was one shilling, "compensation to the injured party is the basis of the primitive administration of justice, and the party himself levies execution" (*m*).

But vengeance at first has no relation to criminal law. It was a personal matter in which the aggressor and the victim alone were interested, and with which society was not concerned. At a later stage we find that any crime, even murder, might be atoned for by such a sum of money as satisfied the representatives of the murdered man. But this practice implies that the community in which it is found in operation, has advanced far beyond the primitive condition of savagery, and has attained a certain degree of social

(*k*) Lubbock, Origin of Civilization, 317.
(*l*) Lubbock, Origin of Civilization, 318.
(*m*) Walker's International Law, 82.

lex talionis and there is compensation. The provision is of "Cities for refuge from the avenger that the manslayer die not until he stand before the congregation in judgment" (*o*). Again, in case of murder, no compensation is to be allowed: "Ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall be surely put to death" (*p*); and on the other hand, no compensation should be exacted from him who was found entitled to the protection of the City of Refuge, showing that the distinction between murder and manslaughter was at this time and by this people well recognized, which is not the case with primitive man—his only rule is "a life for a life."

In the trial scene depicted on the shield of Achilles Homer gives us a glimpse of the administration of justice in Greek society at a primitive or very early stage. A criminal suit is represented as being in progress. The parties plead on either side.

The scene represents "two men striving about the blood-price of a man slain; the one avowed that he had paid all, expounding to the people, but the other denied that he had received aught, and each was fain to obtain consummation on the word of his witness, and the folk were cheering both, as they took part on either side, and the heralds kept order among the folk, while the elders, on polished stones, were sitting in the Sacred Circle, and holding in their hands staves from the loud-voiced heralds. Then before the people they rose up and gave judgment, each in turn, and in the midst lay two talents of gold to be given unto him who should plead among them most righteously."

Compare this stage of civilization with that represented in the Mosaic provisions for the Cities of Refuge. In the Hebrew record we have the blood-avenger with his right of revenge explicitly recognized. In the Greek there is the same party to the proceedings, only he is not seeking blood, but "blood-price." Compensation for the slain man is part of the recognized procedure in Greece, but not in Israel.

(*o*) Numbers, xxxv, 12.
(*p*) Numbers, xxxv, 31.

In Israel if it is murder the slayer must die, if it is not murder he is absolutely protected in the City of Refuge.

The Greek and Hebrew laws are both based on the lex talionis, and are modifications of it. What a hold the principle of vengeance had on the Greek mind we see again in Plato. Professor Jowett notes it as a defect in Plato's criminal jurisprudence that he remits the punishment when the offender has obtained the forgiveness of the murdered person's kindred, as if the crime were a personal affair between individuals, and not an offence against the state.

Coming to our own legal history, Sir Frederick Pollock tells us that "In Anglo-Saxon as well as in other Germanic laws we find that the idea of wrong to a person or his kindred is still primary, and that of offence against the commonwealth secondary even in the gravest cases."

"Personal injury is, in the first place, a cause for feud, of private war between the kindred of the wrongdoer and of the person wronged. But the feud may be appeased by the acceptance of a composition. Some kind of arbitration was probably resorted to from a very early period to fix the amount. The next stage is a scale of compensation fixed by custom or enactment, for death or minor injuries, which may be graduated according to the rank of the person injured. Such a scale may well exist for a time without any positive duty of the kindred to accept the composition if offered. It may serve only the purpose of saving disputes as to the amount proper to be paid when the parties are disposed to make peace, but this naturally leads to the kindred being first expected by public opinion, and then required by public authority, not to pursue the feud if the proper composition is forthcoming, except in a few extreme cases which also finally disappear. At the same time the wrong done to an individual extends beyond his own family; it is a wrong done to the community of which he is a member" (*q*). A period has been reached in the progress of civilization when an offence has its public and private aspects pretty clearly distinguished by the Anglo-Saxon terms. There is Wer, the

(q) I. Pollock's History of English Law, 24.

value set on a man's life, increasing with his rank; Wite, the fine payable to the king.

It was only by degrees that the principle became established, that the members of the commonwealth must be content with the remedies afforded them by law, and must not seek private vengeance, and that on the other hand public offences cannot be remitted or compounded by private vengeance. The rights of the individual become merged in the rights of the state.

"On the eve of the Norman conquest what we may call the criminal law of England contained four elements which deserve attention. Its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood-feud, of the tariff of wer and bot and wite, of punishment in life and limb. As regards the malefactor the community may assume one of four attitudes: it may make war upon him, it may leave him exposed to the vengeance of those whom he has wronged, it may suffer him to make atonement, it may inflict on him a determinate punishment—death, mutilation or the like" (*r*). Here we have intermingled in one period of our own past history vengeance, retaliation, the blood-avenger, atonement and punishment by the state. It is a transition period. "The old order changeth." "At the end of the period we already see the broad outlines which will be visible throughout the coming ages. . . . We go back but a few years and we are breathing a different air." The change is from comparative barbarism to incipient civilization. Prior to the conquest "England was divided into three laws: Wessex law, Mercian law, Dane law." William did not supersede English law, but decreed that all men were to have and hold the law of King Edward"—that is to say, the old English law—but with certain additions which he had made to it. It may not be incorrect to describe English law at that time as "a wonderful confusion" (*s*). Speaking of this period again, contemporaneously with these conditions, we are told "went on another process which we may call the institution

(*r*) II. Pollock's Hist. 447.
(*s*) I. Pollock's Hist. 78.

of true punishments." To punish justly was difficult in days when police and prisons were unthought of as a means of punishment. "Imprisonment would have been regarded in those old times as a useless punishment. It does not satisfy revenge, it keeps the criminal idle, and do what we may, it is costly" (*t*). Fines and banishment, mutilation or outlawry were the punishments usually resorted to. Punishment as yet does not regard the reformation of the offender, it is simply retributive; it is, in truth, modified vengeance, and bears the marks of its ancestry. Centuries elapse before the conception of punishment acquired the preventive and reformatory elements which we see in it to-day. It is almost within our own time that the reformatory element has come into existence. It was through the work of Bentham, Howard and others during last century that the transportation of convicts was superseded by the present penal system of England. Of transportation as a punishment, Bentham said: "Among savages, when to a certain extent a man is sick in body, he is cast out and thought no more of. In a nation civilized in other respects the same barbarity is still shown to the at least equally curable class of patients in whose case the seat of disorder is in the mind." From the Norman conquest to the present day what are the changes? We have left behind three of the four elements of the criminal law of that day—outlawry, blood-feud or vengeance, and atonement. As recognized elements in our criminal system these have disappeared. The private wrong in grave offences has been merged in the public offence against the community. Traces of the ancient day of private vengeance can yet be seen in such survivals as the private prosecutor, still allowed to intervene in certain cases. Blood-feud has left no trace behind. It necessarily disappears with the intermarriage of clans and tribes, and the tracing of kinship in both maternal and paternal lines. It cannot long survive the passing of the stage," at which "the members of each clan were, in fact or in fiction, bound to each other by the tie of blood, and were accounted strangers in blood to the members of every other clan" (*u*).

(*t*) II. Pollock's Hist. 514.

(*u*) I. Pollock's Hist. 459.

The outlawry of the eleventh century, too, has disappeared. "It was the capital punishment of a rude age. It is the last weapon of ancient law, the sentence of death pronounced by a community which has no police constables, or professional hangmen" (*v*). In modern times outlawry has become mere criminal process, a means of compelling accused persons to stand their trial. What remains is punishment proportioned to the offence inflicted by the state.

Punishment, whilst still essentially retributive and deterrent is gradually coming to assume a new attitude towards the criminal himself. Hitherto the law has punished crime primarily in an impersonal and mechanical way, not ostensibly regarding the welfare of the criminal, as one of the matters to be considered or dealt with. Our criminal code takes no account of heredity and environment, and not much account of mental disease. These matters have been left to the wisdom and humanity, to the judicial discretion, of those who administer the law. A new departure seems near at hand. "Positivist criminology" is agitating for a better classification of criminals, which shall distinguish between the hereditary and professional criminal on the one hand, and the man whose crime is foreign to his true character on the other. It further demands that punishment shall be above all things curative and reformatory, whilst still retributive and deterrent. It was Bentham's opinion that crime was a manifestation of mental disease, and that it should be so treated. The new school of criminologists hold the same view. Should their views prevail the punishment of crime will more and more become the treatment of the criminal, for his mental and moral disease, until he is cured.

"The moral cure of the criminal" is preached like a new gospel by some enthusiastic philanthropists. "It is the great moral discovery of the present age that very much may be done in this direction" (*w*).

Some men would say it is the revival of a doctrine taught in Palestine eighteen centuries ago. Perhaps the greatest

(*v*) II. Pollock's Hist. 238.
(*w*) Amos, Science of Law, 279.

advance which has been made, is in regard to the prevention of crime. The most radical new departure is that made by our Children's Protection Act, which enters the hitherto sacred precincts of the family, and takes the children from the criminal or dissolute parents, to be cared for under state supervision; hitherto the family had been regarded as a "unit" of society in many ways, and to interfere between parent and child was a thing the state almost refused to do. But a new principle has now been adopted, and where the interest of the state requires it, children are to be taken from their parents in order that they be trained up to a good and useful life rather than to swell the ranks of the criminal classes.

The abolition of the death-penalty in such countries as Italy, Holland, Portugal, Roumania, Belgium and Switzerland is another indication of the direction in which the vis agens is moving.

Within our own day have been developed the indeterminate sentence, the suspended sentence, the measures provided for the reformation of criminals, for the prevention of crime, for testing the sanity of accused persons; and we have invented a new word, "criminology." From the vengeance of the savage to the humanity of the suspended sentence is a far journey. The human race has been for ages on the way, and it has been accomplished "by gradual steps as singularly alike in the main, in different lands and periods, at the corresponding steps of advance, as they have differed in detail"(*x*).

G. M. MACDONNELL.

(*x*) Pollock's Hist.

EXPROPRIATION OF PROPERTY.

From time immemorial the claim of the state, that property, liberty and even life itself, should, under certain circumstances, be sacrificed at the call of national exigency, has been a recognized principle in constitutional as well as despotic governments. The maxim of Bacon, Salus populi suprema lex, was founded upon this generally accepted doctrine. So deep-seated had it become that the great Sir Matthew Hale propounded the almost startling proposition that extreme necessity justified communism. In casu extremæ necessitatis omnia sunt communia. The common law of England gave no right of action to the individual, whose property was seized for the purposes of defence in times of war. That the owner of a building, destroyed to arrest the progress of a fire, should be without remedy for the injury sustained, had its origin in the like doctrine that individual welfare, in cases of necessity, should yield to that of the community. It can readily be understood how, from this basic principle, the comparatively modern doctrine of expropriation, that private property may be taken for some specific object of public utility, upon the owners being paid a reasonable compensation, took its rise. It is needless to say, while the Legislature never scruples to exercise this power for an apparent public good, it is resorted to with great caution. Lord Chancellor Cottenham in Stone v. The Commercial Railway Company (*a*), made use of the following strong language: "At the same time it is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not . . . be permitted to exercise powers beyond those which the Act of Parliament gives them, and to keep them most strictly within the powers of the Act of Parliament. The powers are so large—it may be necessary for the benefit of the public—but they are so large and so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those

(*a*) 4 M. & Cr. 120 (1839).

powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament."

The name, Eminent Domain, Dominium eminens, was brought into use by Grotius in the early part of the seventeenth century. His definition of this superior right, so called, may prove interesting: "We have elsewhere said, that the property of subjects is under the eminent dominion of the state, so that the state, or he who acts for it, may use or even alienate or destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way."

Blackstone thus defines the limit of the exercise of this power: "But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. . . . All that the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an extension of power which the Legislature indulges in with caution."

It is a moot question whether "eminent domain" is a reserved right attached to the land of every owner or whether it is a necessary attribute of sovereignty in the state. The interference, however, by whatever right of claim exercised, being one of such extraordinary character, has been sparingly used and safeguarded with the utmost care.

The construction of railways in England in the earlier years of the century made applications to Parliament for expropriation powers so frequent, a general Act was passed, called the Lands Clauses Consolidation Act, 1845, which was amended in 1860 and in 1869, and is now cited as the Lands Clauses Consolidation Acts, 1845, 1860, 1869. Two causes led to the enactment of these Acts. First, for the sake of greater uniformity. Second, to avoid the necessity of separating the provisions for compensation in all Acts conferring

expropriation powers. These Lands Clauses Consolidation Acts are imported into and read as a part of every Act of incorporation of a public nature receiving legislative sanction which requires the acquisition of private property to prosecute its works. The Act of 1845 and amending Acts is really a code regulating the law and practice of eminent domain.

In France the right of expropriation is recognized by the Code Napoleon.

In the United States of America the exercise of this power is safeguarded by an article of the Federal Constitution, which provides that "Private property shall not be taken for public use without just compensation." A similar provision is found in the different constitutions of the several States.

To constitute an act of eminent domain in some of the States of the latter country, it is not necessary that the use for which the property is taken should be of a public nature. There are several cases in which the Legislatures have authorized the taking of private property for private use whereby the general welfare will be promoted by the increased prosperity which necessarily results from developing the resources of the country. By the free and ready exercise of this power, there is danger of lapsing into communism or socialism. Every argument urged for its exercise proceeds upon the principle that if good is accomplished through its agency, the invasion of private rights will be excused. According to Vattel, public safety alone justified the excuse for invoking its aid. We have made rapid strides since the days of Vattel.

In England Parliament is the sole judge whether the use will justify the exercise of the power of eminent domain. Not so in the United States. Here Congress, or the Legislature of the State, is the exclusive judge whether the exigency exists which calls for the exercise of the power; but what is such public use as will justify its exercise is a question for the Courts.

In 1894 the Legislature of New Brunswick passed an Act enabling the Sackville Rural Cemetery Company to expropriate the real estate of private persons or corporations for

the purpose of the enlargement of their cemetery. The health of the locality was the plea put forward in support of the claim to grant the power. In 1895, the same Legislature gave like powers to a company formed for the purpose of operating coal mines and establishing smelting works.

Under the Lands Clauses Consolidation Acts, when the compensation claimed is above fifty pounds, the assessment is settled either by arbitration or by a sheriff's jury, at the option of the claimant. The basis on which such compensation is made is the value of the lands to the owner, and not their value when taken to the promoters. The question is not, what will the persons who take the land gain by taking it, but what the person from whom it is taken will lose by having it taken from him. Arbitrators and juries generally award fair, if not liberal, compensation, because of the compulsory eviction of the individual under Parliamentary powers. The inviolability of ownership generally affords a sufficient guarantee that the interests of the individual would not suffer at their hands. Nemo de doma sua extrahi debet. In awarding compensation, they likewise take into consideration the potential value of the lands expropriated. If, in the vicinity of a city, their eligibility for building lots. If water is sought to be diverted, the reasonable expectancy of its being required for purposes of power in driving machinery. It should be borne in mind, where the damage complained of has arisen in acts done on the lands taken, the measure of compensation for damage done to lands held therewith is the whole consequential loss which the owner has sustained thereby.

In assessing damages the basis of valuation when lands are taken, is regulated, not by their agricultural value, but by the capabilities they possess which gives them their highest value. The principle was very clearly illustrated in our Exchequer Court in the case of Burton v. The Queen (*b*). In that case the Government offered the claimants $72.50 for ground taken for the construction of a railway. Upon their refusal to accept this offer it was referred by the Minister of Railways to the official arbitrators, who awarded them $100

(*b*) 1 Ex. C. R. 87.

as full compensation for the two and one-half acres taken, upon their estimated value for agricultural purposes. Upon appeal to the Exchequer Court, it was held, its real value in consequence of the increased demand of the land brought about by the construction of the railway was the true criterion in estimating compensation, and the Court thereupon assessed it at the sum of $8,200.

Under the fifth article of the Federal Constitution of the United States, which provides for the right of eminent domain in these words, "Private property shall not be taken for public use without just compensation," nice questions have arisen in the Courts as to the force of the words "just compensation." What significancy has the term "just"? Does it place the matter upon a broader and more equitable basis? It must have been inserted for some purpose. Doubtless it was introduced with the intention of intensifying the meaning of the word "compensation," and of conveying the idea, that the award to be rendered for the property taken should be full, substantial and ample. There is, however, a consensus of opinion that in estimating the value of the property taken for public use, it is the market value which is to be considered. The following definition of this term by the Court in Lawrence v. Boston (*c*), has not been questioned: "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article, not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy."

It has been held the market value includes the value for the use to which it may be put. Its adaptability for any particular industry by reason of its situation; its natural advantages and surroundings, its intrinsic character as well as its artificial improvements, are all elements to be considered in estimating the compensation.

(*c*) 199 Mass. 126.

Boom Co. v. Patterson (*d*) affords a good example, illustrative of this principle. Patterson, the defendant, owned the greater part of three islands in the Mississippi River, above the Falls of St. Anthony, which were admirably adapted for boom purposes. The value of the land apart from consideration of boom, was only $300. Yet, in view of its adaptability for these purposes, the jury found for the claimant the sum of $9,358. The Supreme Court of the United States sustained the finding and in delivering judgment laid down the following principles:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding

(*d*) 98 U. S. 403.

in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his land."

The meaning to be attached to the words "public use" in the eminent domain provision of the Constitution has been a fruitful subject of controversy, and has given rise to much litigation. Some of the state constitutions in terms prohibit the taking of private property for private use. Judge Cooley, in his work on Constitutional Limitations, says: "That the Legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit."

The Courts have held the question of "public use" is a judicial one. The Legislature first decides whether the expropriation sought to be made is in the public interest. whether that particular use is a public one or not, within the meaning of the Constitution, is a question for the judiciary. It is not affected by the fact, however, that the use of the benefit is local or limited, or, in other words, whether the entire community, or any considerable portion of it, should directly participate in the benefit to be derived from the property taken or not. It may be for the benefit of the inhabitants of a small locality; yet the use must be common.

The doctrine of eminent domain oscillates between the extremes of individualism and socialism, leaning towards the latter. At present a well recognized legal means of promoting the interests of the community at large, it may become, unless guarded with vigilance, a weapon in the hands of the socialist for the subversion of law and order.

SILAS ALWARD.

St. John, N.B.

EDITORIAL REVIEW.

Municipal Control of Wages.

In Kelly v. Winnipeg, 12 Man. L. R. 87, the question was raised as to the power of a municipal council to regulate wages in contracts with the municipality. The following resolution was passed by the Council, which the applicant moved to quash:—"That in future a clause be inserted in all contracts passed through or let by the Council to the effect that contractors on city works should not pay their labourers or other employees a less rate of wages than seventeen and a half cents per hour, and that rate shall be the minimum rate of wages for all labouring men to be employed on said contracts or on any new construction work undertaken by the City by the day."

Bain, J., held that the resolution related to expenditure of money that was clearly within the authority of the Council to make, and that the expenditure was not in itself illegal and *ultra vires*. The Full Court affirmed the decision without calling upon counsel for the respondents. But the point does not seem so clear. It was proved, and in fact undisputed, that the ruling rate of wages was fifteen cents per hour, and that labour could readily be got for that price. The action of the Council then amounted to a gratuitous expenditure of an excess over market prices for purely sentimental reasons. The decision of the Court then, reduced to a naked proposition, is nothing more than the truism that expenditure of money for municipal purposes is within the power of a municipal council. No one will dispute that. But the useless or extravagant expenditure of money was what was complained of. And where it is admitted that a council is disposing of funds gratuitously, one would have supposed that their action would have been restrained. The question is

necessarily one of principle, not of degree. And that being so, the principle is the same if double the market price were paid. Still further—if the contractor did not pay his workmen and the Council passed a resolution to pay them, although the contractor had already been paid, the principle, as expounded by the Court, would have been precisely the same, that is to say, expenditure of money is within the power of a council, therefore it is not *ultra vires* to spend money. There is no difference in principle, but in the latter case, one would not hesitate to impeach the gratuitous payment of wages on the default of the contractor to pay them, as an unwarranted expenditure. If, for instance, a work could be performed for $1,000, and the council resolved that, nevertheless, it would pay not less than $20,000, the principle would be precisely the same. But would a ratepayer have to submit, and take his redress at the next election by locking the treasury after the money was gone?

The answer made by the Court, that the proper appeal is to the ratepayers, is, to a great extent, begging the question. If it is an act of indiscretion, that is true. But if it is *ultra vires* it is not so. If it is *ultra vires* to give away money, the proper appeal is to the Court. A ratepayer has the right to prevent expenditure of money for which no consideration is given. No doubt a bad bargain of the Council could not be interfered with, if valid. But a deliberate resolution to continue making bargains which are admittedly disposals of money for which no value is given, and known to be so, is nothing but a deliberate disposal of money without warrant, amounting perhaps to misfeasance in office of the members of the Council. A year's incumbency of such a Council might impose a burden upon the ratepayers which they could not get rid of for years; and we very much doubt if ratepayers are bound to wait and see their municipality running to ruin without any redress save to turn out the offending Council after the mischief has been done. We do not for a moment mean to say that mere extravagance or incompetence is ground for an appeal to the Courts; but deliber-

ate and systematic overpayment of municipal funds, acknowledged, and placed on the ground of sentimentality alone, ought to be restrained upon principle, and not allowed to run on until the degree shocks the conscience.

There are other considerations which were not raised, and some of which probably could not have been raised, upon the motion. The expenditure of money should be authorized only by by-law, and the resolution might have been *ultra vires* on that account. Again, it did not bind either that or any succeeding Council. *Quære*, could it have been enforced by the Council if the contractor had refused to pay more than fifteen cents per hour, and the men had accepted that sum?

The success of the labour element in this case will probably lead to further attempts to induce municipal Councils to legislate in this way, and we should like to see the question again raised and more thoroughly discussed.

CORRESPONDENCE.

Delay in Patent and Land Titles Offices.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—I have just received by mail the following card from a Local Crown Land Agent:—

OCT. 1ST, '98.

DEAR SIR,—In reply to your letter respecting the application for Patent of I. A. P., I have to state that owing to the heavy demand for Mineral Patents the work in this Department is congested and it takes from three to four months to get a patent now.

Yours truly,

X.

This refers to an application for Patent under Free Grants and Homesteads Act, R. S. O. 29, which I sent him on 23rd July last, and shews that I cannot expect to hear of the issue of the Patent till nearly Christmas.

Now the fact of the matter is, that in nearly every application under this Act, except in the case of adverse claims, on the ground of improvements, or some such cause, the patent is granted as a matter of course, the evidence submitted, not being further verified, and there is no excuse for the delay.

But after the Patent is issued from the Department, if it is dated subsequent to the year 1887, the owner, or party interested in the land, or his solicitor is frequently subjected to a similar delay (which is quite as embarrassing as the other) from the office of the Local Master of Titles, to whom all patents are sent, in the Districts.

I sent a transfer, under the L. T. Act, of 1¼ acres to a Local Master in October, 1895, have complied with several requisitions made by him on me with regard to it, have patiently awaited a reference by him to the Master of Titles, and up to date it has not come.

All these delays may mean nothing to the officials in the Department, and the Local Masters, but they cause serious injury to land-holders, by hampering the interchange of land. It seems to me our policy ought to be to endeavour to obtain facilities for the interchange of real property equal to those which obtain for the commerce in personal property, seeing that here, as in every new country, land is cheap, and mostly held by poor men.

I will not prolong this letter, but close by asking whether there does not seem to you to be here room for improvement in the administration of the law.

Yours truly,

G. S. WILGRESS.

HUNTSVILLE, ONT., 7TH OCT., 1898.

THE

CANADIAN LAW TIMES.

DECEMBER, 1898.

ARREST OF ABSCONDING DEBTORS.

IF there is one branch of law more than another in which it is of importance that there should be no uncertainty, it is perhaps to be found in the statutory provisions relating to the arrest of absconding debtors, and this for a two-fold reason. First, that a creditor desiring to avail himself of the peculiar remedies provided in such case requires to do so with the utmost possible despatch, otherwise he will probably find it too late to act at all; and, secondly, that a false step in the matter will infallibly subject him to a serious action for damages.

Unfortunately, the law upon the subject in our Province is in anything but a state of certainty. Opinions the most diverse upon the matter have been expressed by learned Judges, to whom we have been accustomed to look for the correct exposition of disputed points of law.

That being the case, it will, it seems to us, perhaps serve some useful end if we examine the state of the law upon the subject, and endeavour, if possible, to reconcile some of the apparently contradictory views that have been expressed, or at least to form some idea as to what course may be safely adopted in pursuing the creditor's prescribed remedy.

Our law upon the subject is largely based upon the Imperial Statute 1 & 2 Vict. c. 110. That Act introduced in England the necessity for a Judge's order to warrant the arrest; prior thereto a simple affidavit of indebtedness was sufficient.

The Judge's order was granted on satisfactory evidence being adduced both of the debt and that there was probable

cause to suppose that the defendant was about to leave the country.

Similar legislation was introduced in this country in 1858 (22 Vict. c. 96), now R. S. O. c. 80, s. 1, the provision being that where a creditor, etc., shows by affidavit "such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the said party or plaintiff in particular, the Judge may order," etc.

The English law was further restricted by the Debtors' Act, 1869, which provided that the Judge must be satisfied that the absence of the defendant from England would materially prejudice the plaintiff in the prosecution of his action.

The main point on which the learned Judges have differed is the question as to what is sufficient to indicate "intent to defraud creditors" on the part of the debtor, and, more specifically, whether the intended departure from the Province of a debtor without means is of itself sufficient to warrant the inference of such fraudulent intent.

The question was thoroughly discussed in the cases of Scane v. Coffey (*a*) and Coffey v. Scane (*b*). Prior to the appearance of these cases, divergent views had been expressed by various of the Judges in Robertson v. Coulton (*c*), Toothe v. Frederick (*d*), and Rogers v. Knowles (*e*), and these latter cases are referred to in Scane v. Coffey and Coffey v. Scane.

Of the cases mentioned, Robertson v. Coulton is the earliest. In that case Mr. Justice Osler defined the law, as in his view it had always obtained in this Province, as follows:

"But the defendant admits that he was about to leave Ontario. He says that his intention was well known, and that he never attempted to conceal it, as he was going away

(*a*) 15 P. R. 112; 25 Ont. R. 22.
(*b*) 16 P. R. 307; 22 App. R. 289.
(*c*) 9 P. R. 18.
(*d*) 14 P. R. 287.
(*e*) 14 P. R. 290.

with intent to better his condition, being unable to pay his debts in Canada. Therefore, he says, he was not going away with intent to defraud. I think the plaintiff has nothing to do with the defendant's reasons. The facts are enough for him. The defendant is indebted to him, and he is about to withdraw from the jurisdiction. That has always been considered sufficient to warrant an arrest."

Then came Toothe v. Frederick, supra. In that case the learned Chancellor expressed his idea of the law as follows:

"Take the case of a person indebted, without substance, who contemplates removing from Ontario to better his condition; it seems to be in the teeth of the statute to hold that such a one is leaving with intent to defraud his creditors. Some expressions which look that way in Robertson v. Coulton, 9 P. R. 16, are, I venture to think, too broadly expressed," etc.

This latter case was followed closely by Rogers v. Knowles, supra, in which Mr. Justice Rose emphatically approved of the learned Chancellor's view, expressing himself as follows:

"Having in view the decision of Toothe v. Frederick, delivered on the 26th March last in the Chancery Divisional Court, the judgment being that of the learned Chancellor for the Court, unless I come to the conclusion that the defendant intended to quit Ontario for the purpose of defrauding his creditors, I must conclude that there is not sufficient ground for holding him in custody. I desire to express complete concurrence in the view of the learned Chancellor in such judgment, that if a man has no assets his leaving the country affords no evidence in itself of any intention to defraud creditors; or, in other words, that if a debtor's remaining in the Province can be of no assistance to his creditors in recovering their debts, his leaving the Province cannot by any possibility be a fraud upon such creditors."

So the matter stood when the Coffey and Scane cases came up for adjudication.

In Coffey v. Scane (*f*), Armour, C.J., sitting in Divisional Court, says: "Where a creditor for $100 or upwards shows

(*f*) 25 Ont. R. 22.

by affidavit such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud his creditors generally, or such creditor in particular. And the reason that such inference is raised is that he is removing his body, which is subject to the jurisdiction of the Courts of Ontario and liable to be taken in execution, beyond the jurisdiction of such Courts and beyond the reach of their process."

The learned Judge then refers to the terms of the bail-bond required by the statute to be entered into by the party arrested, as bearing out his view.

He then proceeds to criticize the judgment in Toothe v. Frederick, supra, pointing out that the inference above referred to (viz., of intent to defraud), and the reason for it were lost sight of in that case. Referring to the words of the learned Chancellor in the last named case above quoted, viz., "Take the case of a person indebted, without substance, who contemplates removing from Ontario to better his condition; it seems to be in the teeth of the statute to hold that such a one is leaving with intent to defraud creditors" the learned Chief Justice remarks: "The same reasoning would apply to a person indebted, with substance, who contemplated removing from Ontario to better his condition, leaving his whole substance behind him; and so the statute would only be applicable to a person indebted with substance who contemplated removing from Ontario taking his substance with him, which is certainly not a construction which has ever been put upon the statute." The learned Chief Justice then refers with entire approval to Mr. Justice Osler's view, as expressed in Robertson v. Coulton, supra.

In Coffey v. Scane (*g*) the question came up for discussion before the Court of Appeal.

It would seem to be fairly deducible from the remarks of the then learned Chief Justice of Ontario that his view coincides with that of Chief Justice Armour. His words are: "If the defendant had confined himself to the statement that the plaintiff contracted the debt in Canada, then

(*g*) 22 A. R. 229.

went to the foreign country largely indebted, and after a year there returned to Ontario, and satisfied the Judge that he was again immediately to leave, or information to that effect, I hardly see what tenable objection could be taken to the proceeding; the Judge might well consider that a case was made out to warrant a capias."

The learned Chief adds: "I am aware that there has been a difference of opinion among the Judges on this subject."

Mr. Justice Osler adheres to the view expressed by him in Robertson v. Coulton, supra. He says: "I see no reason to recede from anything I then said. If the debtor, a resident, was about to withdraw permanently from the jurisdiction, that, unexplained by him, was quite sufficient to warrant his arrest, and hundreds of persons have been arrested on affidavits showing nothing more; the inference drawn, and justly drawn, being that in so departing and withdrawing his person from the jurisdiction there was the intent to defraud. . . . I am not aware of any case in which 'the intent to defraud' was rebutted merely by the explanation that the debtor was going away in order to better his condition, or that his intention to depart was open and notorious. . . . I think the law would be in a most unfortunate state if a creditor who caused his debtor to be arrested under such a state of facts as has been here disclosed were to be left to the tender mercies of a jury in such an action as the present."

The view of Mr. Justice Maclennan, expressed in his judgment in the same case, differs somewhat from that of the learned Chief Justice and Mr. Justice Osler. Mr. Justice Maclennan refers to the statute of Elizabeth against fraudulent conveyances as a fair criterion of what is sufficient to make out the fraudulent intent. After pointing out the construction which has uniformly been placed upon the language used in that Act, has always been that it is not necessary that there should be proof of an actual and express intent to defraud creditors, but that it is enough if the facts are such as to show that the conveyance or settlement would necessarily have that effect, the learned Justice goes on to say: "So, under the present Act, the intention to

defraud, by the very terms of the Act itself, may be inferred from facts and circumstances, and, therefore, from the necessary or probable consequences, having regard to all the surrounding circumstances, of the removal from the country."

Up to this point in the judgment one would fairly gather that the learned Justice coincided with the views of his learned brothers, the Chief Justice and Mr. Justice Osler. He continues, however: "I am, with great respect, unable to concur in the broad statement of the law by the learned Chief Justice in the present case, that the intent to defraud is to be inferred from the mere intention to quit Ontario on the part of a debtor. . . . In my judgment, the mere fact of a debtor intending to leave or having left Ontario is not of itself sufficient to raise the inference of an intention to defraud creditors, but, on the contrary, other facts and circumstances must be shown from which the inference may properly be drawn."

The present learned Chief Justice of Ontario merely records his concurrence in the views of Mr. Justice Maclennan. This is, we think, regrettable, as the lucid judgments of the learned Chief Justice rarely fail to throw some new and valuable light upon any subject discussed by him, and would no doubt have been of material assistance in the present case.

It will be seen from the above citations that the differences of opinion are marked and radical. Now, as to the possibility of reconciling at least some of them. The opinion of Boyd, C., and Rose, J., is of course diametrically opposed to that of the late Chief Justice of Ontario and those who coincide with him, and must stand as a dissenting view. But it seems to us that a careful analysis of the judgments of the late Chief Justice and Maclennan, J.A., may lead one to the conclusion that the difference between them is more apparent than real.

We think the explanation of the apparent difference lies in the fact that the late learned Chief Justice in delivering a short judgment on the subject has omitted (perhaps unconsciously, perhaps intentionally, feeling sure that the ellipsis would be supplied by his readers) to give expression

fully in black and white to the ideas he meant to convey, and that Mr. Justice Maclennan, taking the statement literally as expressed, has found himself unable to agree with it. If that is the true explanation, we are not at all surprised at the divergence of opinion.

Our strong impression is that the learned Chief Justice himself would dissent most vehemently from the proposition he has himself laid down, in that literal acceptation of it. Mr. Justice Maclennan says: "I am unable to concur in the broad statement of the law by the learned Chief Justice in the present case, that the intent to defraud is to be inferred from the mere intention to quit Ontario on the part of the debtor."

It is perfectly true that the learned Chief Justice has laid down the proposition as broadly and as baldly as Mr. Justice Maclennan quotes it, and as so laid down, taking it in its literal acceptation it must, we think, be dissented from by everybody, not excluding the Chief Justice himself.

To take an exaggerated instance, suppose the case of a wealthy man, well known to be such, residing in Ontario, about to quit the Province, having unsettled debts of considerable amount (but trifles as compared with the extent of his means) and leaving ample substance behind him in the Province. Such a person would fulfill the literal requirements of the proposition, but it is scarcely necessary to say that an application for an order for arrest would not for a moment be entertained in such a case; the reason being, as we take it, that the ample provision for satisfaction of debts would effectually rebut any presumption of intention to defraud.

It seems to us that when the learned Judge spoke of a person about to go to a foreign country "largely indebted," he meant a person destitute of means and about to leave without having made any provision to pay his debts. He then proceeded to discuss the question which mainly occupied his mind at the moment, viz., how far the element of intention on the part of such debtor affected or could affect the matter.

The difference as far as we can gather, which Mr. Justice Maclennan seems to have taken to exist between his views

and those of the learned Chief Justice consisted in the fact that the latter held that the departure indebted was in itself sufficient to import fraudulent intent, whereas Mr. Justice Maclennan held that the surrounding circumstances, as well as the departure, must be considered before the inference of such intent could be drawn.

Now, would it not appear from what we have said that the learned Chief Justice would subscribe to the latter proposition and repudiate the former, just as readily as his learned brother? If so, does any difference of opinion in fact remain between them?

The view of the Chief Justice, as we read his judgment, is, that the intended departure to a foreign country of an indigent debtor, leaving no provision for the payment of his debts, is ipso facto sufficient authority for an order for his arrest, as amply warranting, and in fact importing the inference of an intent to defraud his creditors. That view is, we think, practically identical with that held by Mr. Justice Maclennan. In fact it would seem to be so deducible from the latter's judgment. At p. 277 the latter expresses himself as follows: "A man may go away with intent to defraud creditors for sums under $100, as well as creditors for larger sums, although only the latter class can arrest him; and although the defendant could not have arrested the plaintiff when he went away the first time (his debts being then less than $100), *he was as much defrauded by the going away* as if he had been a creditor for a larger sum."

Would it not appear from the italicized words that the opinion of the learned Justice is that going away hopelessly indebted is in itself a fraud upon the creditors, quite irrespective of any question of intention; in other words, that the intent is properly inferred from the debtor's conduct. That, we take to be precisely the view of the late learned Chief Justice.

In the writer's humble judgment, that view would seem to be the correct one, and to be consonant with reason and with the spirit of legislation upon the subject. The Statute must be construed in the light both of the words used and the spirit of the enactment. The intention of the Act is to prevent a debtor from escaping payment of his just debts by the

expedient of withdrawing himself and his available means beyond the jurisdiction of the Courts of the land.

Such withdrawal necessarily operates as a fraud upon the creditor, whether the debtor has or has not available means to take with him.

It must not be lost sight of that the human organism, physical and mental, is in itself an asset (if one may so term it in this connection), in some cases an exceedingly valuable one. It is true the law cannot cause the body to be sold to realize his debts, nor can it even compel him to put his physical and mental organism in action with a view to earning money to pay such debts. The law does not seek to do either of these things; but it does realize that the debtor is in control of a money-getting machine—to wit, his own organism, physical and mental, and it says to the debtor, "You shall be detained here until you see fit, of your own accord, to put that organism in motion and thereby, or in some other manner, provide the money to satisfy your just debts."

It may be observed in this connection that the future earning power of the debtor seems to be entirely left out of consideration in the views enunciated by the learned Chancellor (in Toothe v. Frederick, supra), and Mr. Justice Rose (in Rogers v. Knowles, supra). The words of the latter are: "If a man has no assets, his leaving the country affords no evidence, in itself, of any intention to defraud creditors; or, in other words, that if a debtor's remaining in the Province can be of no assistance to his creditors in recovering their debts, his leaving the Province cannot by any possibility be a fraud upon such creditors."

It is fairly deducible from this that the opinion of the learned Judge is that to say that a debtor has no assets is tantamount to saying that his departure from the country cannot damnify his creditors. Of course from our standpoint this is a petitio principii.

We cannot help thinking that the learned Judge leaves out an important consideration in arriving at this view, and that few will be inclined to agree with him.

Take the case of a distinguished author, capable of earning large sums annually by the exercise of his profession.

On the learned Judge's dictum, such a debtor would be entitled to his discharge from an order for arrest for a comparatively trifling debt, on showing that he had no assets.

Surely that could not be the case. And yet, if not, then the element of the future earning power of the individual debtor is added to the data for consideration in determining the question of his right to release.

If the question of the future earning power is once conceded as a proper element to be taken into consideration, then the views of the learned Chancellor and Mr. Justice Rose would seem to become at once untenable.

At least, it would have to be conceded that, in every case, the probable future earning power of the debtor would have to be pronounced upon before the order for discharge could either be granted or refused, and as almost everybody has or may have some earning power, it should seem that on this ground orders for arrest might in the great majority of such cases be justly sustained.

To put the matter differently: granted that the earning capacity is practically an asset, as it undoubtedly is to all intents and purposes in these cases, and the debtor in the great majority of cases cannot be said to be leaving the Province without assets.

To put another case: Suppose the debtor was entitled for a period of years to the use, for his own benefit, of a valuable machine of some description, the property in which remained in another. Such right would be assets in his hands available for the payment of his debt. The difference between treating such property as an asset and treating the earning power of the debtor as such is, in principle, very slight. It will be objected that the cases are totally dissimilar because the property in question (i.e., the right of user) may be converted into money like any ordinary asset for the liquidation of the debt. That is very true, but why may there not be place for the retort that the law has recognized that distinction, and has, for that very reason, provided these special means for making available the earning power of the debtor, although it is not a commodity that can be converted into cash.

F. P. BETTS.

VEXATIOUS ACTIONS AND PLEADINGS.

A consideration of English cases, illustrative and decisive of the practice under the Judicature Act with respect to frivolous and vexatious actions and pleadings, may not unusefully be contrasted with the corresponding practice at common law.

Independently of statutory authority, every court of justice possesses an inherent and original jurisdiction to dismiss or stay frivolous and vexatious actions amounting to an abuse of the process of the court, and also to strike out false and frivolous pleadings (*a*). In a system of procedure providing for demurrer this jurisdiction is rarely exercised, since ordinarily the vexatious or groundless character of the action is apparent upon the face of the pleading, and permits the objection to be raised by demurrer. This circumstance partly explains the absence of any marked instance of an action being dismissed as frivolous or vexatious earlier than the cases of Castro v. Murray (*b*), and Dawkins v. Prince Edward of Saxe Weimar (*c*), decided shortly after the passing of the Judicature Act. The chief explanation is found in the reluctance of the courts to exercise the jurisdiction except in extreme cases, its use being contrary to the theory of the law that a party has a right to bring his complaint to a hearing unless it can be stopped by demurrer or plea (*d*). In Cocker v. Tempest (*e*), Parke and Alderson, BB., point out that the exercise of the Court's power is a matter for most careful discretion, and Blackburn, J., in Dawkins v. Prince Edward of Saxe Weimar (*f*), says that it is to be exercised with the utmost caution and care, and only in plain cases.

But though the groundless character of an action is disclosed on the face of the declaration or statement of claim,

(*a*) Cooker v. Tempest, 7 M. & W. 502; Metropolitan Bank v. Pooley, 10 App. Cas 210; Reichel v. Magrath, 14 App. Cas. 665; Lawrance v Norreys, 39 Ch. D. 213; 15 App Cas. 210; Haggard v. Pelicier Freres L. R. (1892) A. C. 61; Milner v. Bridges, 2 P. & B. 103.

(*b*) L. R. 10 Ex. 213.

(*c*) 1 Q. B. D. 499.

(*d*) Seaton v. Grant, L. R. 2 Ch. 464, per Lord Cairns.

(*e*) 7 M. & W. 502.

(*f*) 45 L. J. Q. B. 569.

and therefore objectionable on demurrer, there seems to be no reason why the matter should not be dealt with summarily on motion before the Court or at Chambers. In addition to being demurrable, the pleading is fixed with its vexatious character, and does not present an arguable question. As observed by Lindley, L.J., in Dadswell v. Jacobs (*g*), any pleading which discloses no reasonable cause of action or defence is demurrable at once, and it is something more, it is perfectly frivolous. One can readily conceive of a frivolous pleading which it would not do to attack by demurrer by reason of an admission of facts set up in the pleading that would thereby take place, and therefore constraining the opposing party to object to it by summary application (*h*).

Where the plaintiff's statement of his cause of action is sufficient in law but groundless and vexatious in fact, it would seem to be debatable whether an application at common law upon affidavits would be entertained for the summary interference of the Court. In Lawrence v. Lord Norreys (*i*), counsel contended that the jurisdiction of the Court was confined to cases where the pleading shows no right of action, but Cotton, L.J., declined to accept this limitation of the Court's power (*j*). By analogy, however, to the practice of the Courts with respect to the pleas of a defendant shortly to be considered, the Court could not consistently try out the merits of the plaintiff's action on affidavits. And certainly if the affidavits of the applicant were contradicted the Court would decline to interfere. Thus in Tidd, 530, it is said: "On shewing cause against a rule for staying proceedings, in an action on a promissory note, in the King's Bench, on an affidavit that the note was obtained without consideration, it being objected that the Court would not interfere in this matter, which was proper for the trial of the cause, the Court said it was often done on such applications, if the other side did not contradict the assertion of the defendant, but where

(*g*) 34 Ch. D. 284.

(*h*) See Phillips v. Phillips, 4 Q. B. D 127.

(*i*) 39 Ch. D. 231.

(*j*) See also Kellaway v. Bury, 66 L. T. 601; Republic of Peru v. Peruvian Guano Co., 36 Ch. D., 498; Fletcher v. Bethom, 41 W. R. 631; Tidd, 9th ed., 515.

there were contradictory affidavits the Court would not interfere in this summary way, but put the defendant to insist on it as a defence at the trial."

The inability to discuss with reference to decided cases the limits of the Courts' inherent jurisdiction to stay or dismiss frivolous or vexatious actions vanishes in considering the attitude of the Courts towards sham and vexatious defences. A pleading clearly absurd or false on its face could be treated as nullity, and the plaintiff might sign judgment as for want of a plea, without a previous application to the Court (*k*). Thus, where the plaintiff declared on two bills of exchange, due 5th and 6th December, and the defendant pleaded a judgment recovered in Michaelmas Term preceding these dates, the plaintiff was considered right in signing judgment (*l*). But unless the plea was manifestly absurd on the face of it, or the defence of its falsity overwhelming, the plaintiff must first have applied to set it aside and could not treat it as a nullity (*m*). A plea good upon its face but false in fact would not be set aside, the Courts taking the position that they would not try the truth of a plea upon affidavit, even though the affidavit of its falsity was uncontradicted (*n*). A contrary ruling was expressed in Richly v. Proone (*o*). There the defendant pleaded in satisfaction of the plaintiff's cause of action, delivery to him of one ton of hemp and one hundred weight of tallow, and the Court on an affidavit that the plea was false made a rule absolute that the plaintiff might sign judgment for want of a plea. In Smith v. Bakewell (*p*), the Court refused to set aside a similar plea, and declined to follow the decision in Richly v. Proone; and in Merrington v. Becket (*q*), Richly v. Proone was virtually overruled.

(*k*) Notes to Idle v. Crutch, 1 Chit. 525; Thomas v. Smithies, 4 Taunt. 668; Penfold v. Hawkins, 2 M. & S. 606; Gray v. Sidneff, 3 B. & P. 398.

(*l*) Vere v. Carden, 5 Bing. 413.

(*m*) Bell v. Alexander, 6 M. & S. 133; 1 Chit. 525.

(*n*) Merrington v. Beckett, 2 B. & C. 81; Smith v. Bakewell, 4 Bing. 512; Papineau v. King, 6 Jur. 539; Edwards v. Greenwood, 5 Bing. N. C. 476; LaForest v. Langan, 4 Dowl. 642; Mitford v. Finden, 8 M. & W. 511; Nutt v. Rush, 4 Exch. 490; Levy v. Railton, 14 Q. B. 418; Cork v. Goode, 13 C. B. 618; McMaster v. Beattie, 6 P. R. 162.

(*o*) 1 B. & C. 286.

(*p*) 4 Bing. 512.

If in addition to being false, the plea was palpably tricky and vexatious, and calculated to create unnecessary delay and expense, it would be set aside or leave given to the plaintiff to sign judgment as for want of a defence (*r*). In Smith v. Bakewell (*s*), this distinction is accurately pointed out by Gaselee, J., as follows: "Where the plea has raised different issues, has been exceedingly intricate, or has been a mockery of the proceedings of the Court, a discretionary power has sometimes been exercised by the Judges, but that cannot be done with respect to a single plea which has nothing improper on the face of it." To debt on a judgment the defendant pleaded a release of December, 1831, but destroyed by accident. Upon affidavit that the plea was false, the Court allowed the plaintiff to sign judgment as for want of a plea (*t*). Tindal, C.J., there said: "If this had been a plea on which only one issue could have been taken, and there had been a profert in curiam of the alleged release, I am not prepared to say that we should not have discharged this rule. But this plea is so ingeniously prepared, that it is likely to occasion perplexity and expense, and the plaintiff might be at a loss whether to take issue on the existence of the release or its destruction by accident. The case, therefore, falls within the principle of Shadwell v. Berthoud (*u*), and Body v. Johnson (*v*), where upon an affidavit of its falsehood, the Court allowed the plaintiff to sign judgment upon a plea so framed as that it might reasonably induce the plaintiff to consult counsel to know how to deal with it."

A singular exception to the exercise by the Court of its power to strike out frivolous pleadings existed at common law with respect to frivolous demurrers, the Courts ruling that they would not try the goodness of a demurrer on motion (*w*). This anomaly was done away with in England by rule of Court H. T. 4 Wm. IV. r. 2, empowering the Court

(*q*) 2 B. & C. 81.

(*r*) Mitford v. Finden, 8 M. & W. 511; Balmanno v. Thomson, 6 Bing N.C 158; Smith v. Hardy, 8 Bing. 435; Nutt v. Rush, 4 Exch. 490; Levy v. Railton, 19 L. J. Q. B. 16; McMaster v. Beattie, 6 P. R. 162; Gabel v. Harding, 2 Kerr, 71.

(*s*) 4 Bing. 512.

(*t*) Smith v. Hardy, 8 Bing. 435.

(*u*) 5 B. & Ald. 750.

(*v*) 5 B & Ald. 751.

or a Judge at Chambers to set aside a demurrer as frivolous, and to give leave to sign judgment as for want of plea. The rule though in terms apparently only applicable to a demurrer by defendant was held to apply equally to the case of a demurrer by plaintiff (*x*). The Court refused to exercise its powers under the rule unless the demurrer was obviously frivolous (*y*), and did not admit of serious argument (*z*). The provisions of the above rule of Court were carried into the Common Law Procedure Act, 1852, s. 89.

The Common Law Procedure Act of England made no alteration in the common law powers of the Courts over vexatious and frivolous actions and pleadings, s. 52 of the Act referring only to pleadings so framed as to prejudice, embarrass or delay the fair trial of the action. This section was adopted in New Brunswick in 1873, but in the revision of the statutes in 1876 it was widened to read as follows: "The Court or a Judge on rule or summons may order any pleading so framed as to prejudice, embarrass or delay the fair trial of the action, or any false, frivolous or vexatious pleading to be struck out, or may make such order respecting the same, and also respecting the costs of the application as the Court or Judge sees fit" (*a*). Under this section it is held that the Court or a Judge may try the truth of a plea on affidavits, and compel the defendant to verify his plea (*b*). No reason is assigned for this conclusion, though presumably it is based upon the consideration that an alteration in the law must have been intended if the enactment was not to be purposeless. It can, however, fairly be submitted that the section was not intended to work a change in the law, but merely to codify it.

Passing to the Judicature Act and orders thereunder, one comes upon provisions for coping with groundless actions and vexatious and frivolous pleadings, with boundaries not at

(*w*) See Thomas v. Smithies, 4 Taunt. 668; Petty v. Hammond, 3 Kerr, 686.

(*x*) Cutts v. Surridge, 16 L. J. Q. B. 193.

(*y*) Tallis v. Tallis, 21 L. J. Q. B. 269; Tucker v. Barnesley, 4 D. & L. 292.

(*z*) Dalton v. McIntyre, 1 Dowl. N. S. 76; White v. Woodward, 4 C. B. 752; Langdale v. Maclean, 10 Jur. 642.

(*a*) C. S. N. B. c. 37, s. 88.

(*b*) Harris v. Fowle, 22 N. B. 389.

once susceptible of exact definition, though now pretty accurately determined by judicial decision. Order XXV., entitled "Proceedings in lieu of demurrer," by Rule 1 provides that no demurrer shall be allowed. By Rule 2, "Any party shall be entitled to raise by his pleadings any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial," etc. By Rule 4 "The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just." A superficial consideration of these rules would fail to suggest that a pleading properly the subject of demurrer should be attacked under Rule 2 rather than under Rule 4, and that the jurisdiction under Rule 4 is only to be exercised where the proceedings are frivolous or vexatious. Nor are cases wanting where Judges have failed to remark a distinction in the application of the two rules. Thus in Burstall v. Beyfus (*c*), Cotton, L.J., says that rule 4 clearly refers to a case where, according to the old practice, a claim would be demurrable; and in Metropolitan Bank v. Pooley (*d*), the Earl of Selborne, after quoting Rule 4, says that under it it is manifest that the Court might order an action to be dismissed on the same grounds as those on which a demurrer might formerly have been allowed. These observations may bear a different construction, and may be in harmony with the accepted reading given to Rule 4, when examined with their context, and one would certainly not care to quote them unqualified by this admission. It is now settled that applications under Rule 4 are not intended to take the place of demurrers, but only to get rid of frivolous and vexatious actions and pleadings, and that questions admitting of legal argument are to be disposed of under Rule 2 (*e*). In the last

(*c*) 26 Ch. D. 41.

(*d*) 10 App. Cas. 215.

(*e*) Parsons v. Burton, W. N. (1883) 215; Kellaway v. Bury, 66 L. T. 599; Dadswell v. Jacobs, 34 Ch. D. 278; Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489; Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co., L. R. (1892) 3 Ch. 274.

named case Lindley, L.J., is thus reported: "To what extent is the Court to go on enquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., Rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched—cases which are obviously frivolous or vexatious, or obviously unsustainable. Lopes, L.J., also there said: "Applications under this rule were never intended to take the place of demurrers. The object of the rule was to get rid of frivolous actions." But because a pleading is demurrable is no reason why it should not be struck out under Rule 4, if, in addition to being demurrable, it shows no reasonable case or defence whatever. Lindley, L.J., is reported as having more than once taken this view of the rule. In Dadswell v. Jacobs (*f*) he said: "Rule 4 allows a Court or a Judge not only to do what may be done under Rule 2, namely, to direct a point of law to be argued, but to strike out a statement of claim or defence, not upon the ground that it discloses no cause of action or no defence, but upon the ground that it discloses no reasonable cause of action or defence, which is another thing altogether. Of course, any pleading which discloses no reasonable ground of action or defence is demurrable at once, and it is something more, it is perfectly frivolous. That is the sort of thing that is struck at by Rule 4." Again, in Kellaway v. Bury (*g*), he said: "It is not because the statement of claim is demurrable from a pleader's point of view that the Court is justified in stamping the action out. It must not only be demurrable, but the Court must see that the plaintiff has got no case at all." At common law we have seen that a pleading would not be summarily struck out unless it was palpably frivolous so as not to admit of serious contention. Under Rule 4 a similar attitude is observed (*h*). A diversity of opinion exists as to whether affidavits are admissible under Rule 4. In Republic of Peru

(*f*) 34 Ch. D. 284.

(*g*) 66 L. T. 602.

(*h*) Attorney-General of the Duchy of Lancaster v. London and North-Western Railway Co., L. R. (1892) 3 Ch. 277; Davey v. Bentinck, 41 W. R. 181; Kellaway v. Bury, 66 L. T. 599; Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 496.

v. Peruvian Guano Co. (*i*), Chitty, J., refused to admit affidavits, and in Attorney-General of the Duchy of Lancaster v. London and North-western Railway Co. (*j*), Lopes and A. L. Smith, L.JJ., affirmed that the pleadings could alone be consulted in an application under the rule. The latter Judge said: "When there is an application made to strike out a pleading, and you have to go to extrinsic evidence to show that the pleading is bad, the rule does not apply. It is only when upon the face of it it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies. In this case it is manifest that you must go to extrinsic evidence to show that the pleading is bad, and directly it comes to that, the rule does not apply." On the other hand, Denman, J., in Kellaway v. Bury (*k*), ruled that affidavits could be admitted in support of an application to dismiss an action as frivolous and vexatious, though it did not escape him that the rule did not seem to authorize the Court to go outside the pleadings. If the Court is proceeding under its inherent jurisdiction to control frivolous and vexatious actions and pleadings it seems that affidavits are admissible, the Court being free to lay down its practice in that behalf (*l*).

This is not in accord, as we have seen, with the practice of the Courts at common law upon applications to strike out false and frivolous pleadings. The provisions of Rule 4 are not incorporated in the rules framed under the Ontario Judicature Act, and the power of the Courts to deal with frivolous and vexatious actions and pleadings is left as at common law. The practice has found repeated acceptance that a pleading will not be set aside on a summary application unless plainly frivolous and free from doubt or difficulty, even though unlikely to be upheld on demurrer (*m*).

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(*i*) 36 Ch. D. 494.

(*j*) L. R. (1892) 3 Ch. 4.

(*k*) 66 L. T. 601.

(*l*) See Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 498; Fletcher v. Bethom, 41 W. R. 621; Lawrance v. Lord Norreys, 39 Ch. D. 231.

(*m*) Glass v. Grant, 12 P. R. 480; Stratford Gas Co. v. Gordon, 14 P. R. 414; Daley v. Bryne, 15 P. R. 4.

EDITORIAL REVIEW.

The Study of Law.

The staff and students of the Law School had, during the past month, the great pleasure of listening to a lecture from Professor Dicey, on the above subject. No one is better qualified to speak upon the systematic learning of law than Mr. Dicey, and consequently we make no apology for reproducing, though in a condensed form, the gist of his lecture.

On opening, he referred to the manifest difficulty at the present day of knowing all the law. Books and reports multiply at such an alarming rate that their numbers absolutely prohibit the acquirement of all that they contain. At one time it was possible to read and know all the law. Coke occupied this position, and he embodied not only all the law, but, as the professor said, a great deal of his own imaginings in print. Again, Lord Eldon probably knew all the law. He presumably may have read his Bible—we will assume that. But he read nothing else but law. His slow, industrious and careful consideration of cases produced the essence of law applicable to them.

At the present day, however, it is impossible to read and to know all the law. And, in consequence, we must adopt some system of reading whereby we may master as much of its principles as will enable us to have a clear apprehension of it. There must be a point of commencement. And the point is Blackstone's Commentaries. Not the modern commentaries as edited by able editors, but the original commentaries, so as to obtain a comprehensive view of the law at a given time. Blackstone covers a vast field, and though perhaps not always exact or accurate, is the best compilation of the law. At this point the learned professor called the attention of his audience to the fact that many important branches of law are not dealt with by Blackstone at all. Thus, little or nothing is said about the law of Contract. That is a subject that has been developed since Blackstone's time by writers of great ability. And so of Corporations or Companies, and other special branches of law.

In connection with this phase of the subject, the professor called attention to the course of legislation. Legislative changes (in England) took place largely as the result of a general expression of public opinion. The effect of the French Revolution upon England was to make men fearful of change, and, in consequence, for some years after that there was very little legislation. Then Bentham and his disciples worked a complete revolution in public opinion, and every single change advocated by Bentham has since his time been effected. To illustrate by the law of evidence, no person who had any interest in the subject matter of the litigation could be a witness. The plaintiff and defendant were the only persons, sometimes, who knew anything about the case, and were, therefore, the only persons who were competent from their knowledge to give evidence. Yet they were excluded from the witness box. The course of public opinion has been crystallized by acts of Parliament from time to time, so that, at the present day, not only may the parties to an action be examined both before and at the trial, but even a prisoner may give evidence at his own trial.

This furnishes a key to the method of reading law systematically. Law as at present constituted being of gradual growth and formation, and marching with public opinion, and being affected by the changes in men and manners, the historical method is the best. Recurring now to Blackstone and his commentaries, the student having mastered the law as expounded by Blackstone at the period at which he wrote, should proceed to trace down from Blackstone's time the history of each branch of the law. He could not accompany those who advised that the study of law was not properly conducted unless the student went back to a date before the conquest. A place of commencement must be fixed, and Blackstone's comprehensive commentaries were sufficient. The historical method is peculiarly fitted for the study of real property law. It is nothing more nor less than the historical growth of dealings with landed property, and perhaps cannot be treated logically. By pursuing the historical method, the student not only gains an intimate knowledge of the subject at the present day, but also of the state of the law at different periods, and the reason for the changes, without

which it is impossible to acquire an accurate knowledge of the effect of the changes.

An additional reason for this method of study, not mentioned by Professor Dicey, is that the student habituates himself to that automatic arrangement of ideas which lies at the base of all proper and accurate thinking and methodical argument which is so useful to lawyers. The skill and ability sometimes displayed in taking up a complicated case, at short notice, is possible only to those who, in addition to having a variety of knowledge of the subject matter in question, have acquired the habit of classifying and arranging all the details in their minds without effort, and of selecting such portions as enable them to elucidate the matter from their standpoint. In the progress of a case too that faculty displays itself, in aid of memory, in all the details of the contest.

The other method of study is the logical method. That method is one upon which Professor Dicey was well qualified to speak, as he had "wasted," so he said, an enormous amount of time in enunciating propositions. The student should endeavour to extract from his reading a positive proposition, but should not content himself with the statement of it until he had examined the negative, and so tested its accuracy. He illustrated this by referring to the law of allegiance and domicil. "Every person born in the British Dominions is a British subject." Leaving out certain exceptions, and certain modern complications of the subject, the student should not consider that the proposition is true and established until the negative is examined. The negative will not only test the accuracy of the positive proposition, but will suggest exceptions which must be themselves examined, and their position will be again determined by an application of the positive proposition. This involves the reduction of law to a set of rules, a process which has been successfully accomplished in several branches of law, particularly by the late Sir James Stephen.

It is needless to say that the lecture was appreciated. It was refreshing and broadening in its effect, and raised one out of the sphere of logic-chopping and word-conflict in which we too narrowly move from day to day in the small contests between our clients in which we daily engage.

"Saw-off" of Election Cases.

During the past few months there has been the usual amount of setting-off of one election petition against another that occurs after a general election. Every safeguard that could be thrown around these petitions, to protect the public from corrupt bargains to conceal corruption, was thought to have been provided. The result shows the difficulty of preventing corruption in any form. It is like defining fraud. If a definition of fraud were laid down more cases of fraud would escape punishment than ever before the definition. To define what is and what is not corruption enables a well educated election agent to avoid the prohibited action, and if it becomes absolutely necessary for party purposes to perform the prohibited action, the well educated worker in the cause throws off his character of agent, or rather never assumes it, and becomes a mere instrument on his own account.

So it is when we come to the matter of trials. No doubt it is lamentable to think that a petitioner should pledge his oath to a wholesale quantity of corruption of every description, and then turn up at the trial and say he can find no evidence to substantiate any of them. But can it be cured? As long as the petitioner is sought amongst an execution proof class that will be the result, and they will come from that class as long as that class is permitted to make up the sum total of electors. If a landed proprietor had to present the petition, he might be more careful, though even then he would be guaranteed against loss by an indemnity fund.

With great deference to those who are more expert in these matters, it seems possible that the fictitious proceeding of bringing two cases on for trial on opposite sides, and each party saying that he has no evidence, might be stopped by binding the petitioner to appear in Court at the trial and enter the witness box, under severe penalties for disobedience. and more severe penalties if he did appear and on his oath stated that when he swore to the charges of corruption he had no personal knowledge that any of them were true, nor any information on which he could rely.

It is not pretended that this would stop the proceeding usually denominated a "saw-off." Once define your position, and the astute election agent, aided by an astute solicitor, will avoid it. But it might result in the procuring of a better class of petitioners, and it might also result in their pledging their oaths only to what they know or have good reason to believe is true. Even then there might be collusion. For a petitioner might appear at the trial enter the box and swear that the charges were true. But how could the Court compel the trial to proceed? The only suggestion that occurs is that an officer similar to the Queen's Proctor should take up the matter and perform the same duties as that official performs in divorce cases supposed to be collusive. Only, he would not be called into action by the Government, but by the Court.

It may be that these suggestions will not serve their purpose, but any effort to prevent collusive suppression of corrupt conduct sworn to, or swearing to corrupt conduct not known to exist should receive some commendation for its own sake.

BOOK REVIEW.

Forms and Precedents of Practice, in proceedings under the Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario, the Surrogate Court Rules, etc., etc. Compiled, collected, revised and arranged by EDWIN BELL, LL.B., of Osgoode Hall, Barrister-at-Law, and HERBERT L. DUNN, B.A., of Osgoode Hall, Barrister-at-Law, one of the Examiners of the Law Society of Upper Canada. Toronto: The Canada Law Journal Co. 1898.

A book of forms is one of the most useful books that one can have in an office, provided always that it is correct and reliable. We can recommend this book as strictly a solicitor's book, and not a collection of forms which the country conveyancer can make use of and havoc with. It contains forms and precedents for everything required in daily practice, and it has the additional recommendation that where they are subject to test by reference to rules the test has always been made. There are a few little errors in the official rules which are corrected in their publication in this volume.

INDEX OF SUBJECTS.

[Ed., *following a title, indicates that it will be found in the* EDITORIAL REVIEW; L. A., *that it is a* LEADING ARTICLE; Cor., *that it is in a letter to the Editor.*]

A.

Absconding debtors, arrest of, L. A., 241.

Actions and pleadings, vexatious, L. A., 251.

Allen v. Flood, L. A., 121.

Appeal, the Court of, Ed., 166.

Arbitration—Statute of Limitations—acknowledgment, Ed., 211.

Arsenic, poisoning by, Ed., 140.

B.

Bills and Notes, irregular forms of, L. A., 85.

BOOK REVIEWS:

- Bedard's Code Municipal de Quebec, 216.
- Bell and Dunn's Forms and Precedents, 264.
- Bligh's Quebec Law Index, 215.
- Bligh and Todd's Dominion Law Index, 118.
- Blyth's Analysis of Snell's Equity, 168.
- Cassel's Ontario Assignments Act, 214.
- Chaudhuri's Law of Sedition, 117.
- Eagleson, Sanderson and O'Dowd's Digest of Australasian Mining Cases, 67.
- Gosnell's Year Book of British Columbia, 67.
- Higgins' Division Courts Act, 214.
- Indermaur's Common Law, 168.
- Lafleur's Conflict of Laws in Quebec, 215.
- Lefroy's Legislative power in Canada, 108.
- Macpherson and Clark's Law of Mines in Canada, 167.
- Martin's Hudson's Bay Land Tenures, 167.
- Phipson's Law of Evidence, 96.
- Porter on Insurance, 117.
- Ringwood's Outlines of the Law of Torts, 96.
- Robertson's Local Courts Act and County Courts Act, 215.
- Snell's Equity, 118.
- Weir's Civil Code of Lower Canada and Bills of Exchange, Act, 96.

Bull and the Scow, the, 71.

C.

Carleton Law Association, report, 1897, 48.
Codicil, revival by, L. A., 25, 49.
Constitutionality of Sunday Laws, Ed., 62.
Contract by compulsion, Ed., 212.
Contracts of Municipal Corporations, L. A., 145.
Conveyance, condition for rescission, Ed., 137.
Costs between Solicitor and Client, Notes on the law of, L. A., 193.
County Judges, Junior, L. A., 82.
Criminal cases, new trials in, Ed., 40.
law, of the origin and growth of, L. A., 217.
Custom, a curious, Ed., 94.

D.

Digest, a new English, Ed., 95.

E.

Election petitions, saw-off of, Ed., 262.
Estoppel, equitable, L. A., 181.
Executor's right of retainer, L. A., 73.
Ex parte cases stated for the Court, Cor., 22.
Expropriation of property, L. A., 230.

F.

Football and manslaughter, Ed., 92.
Foreign assets, succession duty on, Ed., 88, 190.
Forfeiture—Landlord and tenant, Ed., 91.

G.

Goods, sale of—warranty, Ed., 211.

H.

Honours, New Year's, Ed., 17.

J.

"Joe Bowers," Ed., 19.
Junior County Judges, L. A., 82.

L.

Land, personal succession to, Ed., 114.
Titles and Patent Offices, delay in, Cor., 239.
under lease, purchase of, L. A., 1.
Landlord and tenant—forfeiture—waiver, Ed., 91.
Law, the study of, Ed., 259.
Lease, damages for assigning without leave, Cor., 23.
purchase of land under, L. A., 1.
Legislative power in Canada, the Law of, Ed., 108.
Library, light in the, Cor., 46.
Limitations, statute of—arbitration—acknowledgment, Ed., 211.

M.

Malice in law and in fact, L. A., 157.
Malicious prosecution, probable cause or malice in, L. A., 169.
Manslaughter, football and, Ed., 92.
Married woman, conveyance by, as trustee, Ed., 134.
McCarthy, Q.C., the late Mr., Ed., 134.
Mortgage—further advances—subsequent incumbrances, Ed., 140.
Municipal control of wages, Ed., 237.
corporations, the contracts of, L. A., 145.

N.

New trials in criminal cases, Ed., 40.

O.

Ontario Legislation, 1898, Ed., 187.

P.

Patent and Land Titles Offices, delay in, Cor., 239.
Pleadings, vexatious actions and, L. A., 251.
Poisoning by arsenic, Ed., 140.
Process, service of, by agreement, Ed., 93.
Purchase of land under lease, L. A., 1.

R.

Rescission, condition for—conveyance, Ed., 137.
Retainer, Executors' right of, L. A., 73.

S.

Sale of goods—warranty, Ed., 211.
Service of process by agreement, Ed., 93.
Shelley's case, the rule in, Ed., 17.
Soldier, the law and the, L. A., 97.
Solicitor and client, notes on the law of costs between, L. A., 193.
Statutes, insensible, Ed., 90.
Students' dream, the, 119.
Succession duty on foreign assets, Ed., 38, 190.
personal, to land, Ed., 114.
Sunday laws, constitutionality of, Ed., 62.
Supreme Court practice, Ed., 143, 164.

T.

Trustee, conveyance by married woman as, Ed., 134.

V.

Vendor and purchaser. See Purchase—Rescission.
Vexatious actions and pleadings, L. A., 251.

W.

Waiver—forfeiture—Landlord and tenant, Ed., 91.
Warranty—Sale of goods, Ed., 211.
Will. See Codicil.

Y.

York Law Association, report, 1897, 69.

1793

THE CANADIAN LAW TIMES

NOTES OF CASES

AND

INDEX-DIGEST FOR 1898.

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THE CANADIAN LAW TIMES

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[Osler, J.A., 10th December, 1897.

TEETZEL v. DOMINION CONSTRUCTION CO.

Appeal—Printed case—When ordered—Rule 802—Terms.

Except where for the convenience of the Court of Appeal cases ought to be printed, the Court will not, as a rule, force that course upon an unwilling appellant at the instance of the respondent, upon a motion made under Rule 802 (8).

If the respondent desires to have the appeal case printed, he may have it done at his own expense; and the appellant may be put upon terms, in the event of a further appeal by him, upon which a printed case will be necessary, as to the use of the books printed by the respondent.

Aylesworth, Q.C., for the respondent.

D'Arcy Tate, for the appellants.

[Moss, J.A., 22nd November, 1897.

In re SHERLOCK.

Executors and administrators—Application by executor under Rule 938 (a)—Appeal to Divisional Court—Leave to appeal to Court of Appeal—Interest of executor—Reimbursement of costs—Security for costs.

Under Con. Rule 938 (*a*), an executor applied in Chambers, by way of originating notice, and obtained a determination of a question affecting the rights of legatees under the will, which involved the construction of the will; but upon appeal by residuary legatees, the order in Chambers was reversed by a Divisional Court, which put a different construction upon the will.

Held, that the judgment of the Divisional Court was a sufficient protection to and indemnity of the executor, and if he sought to appeal to the Court of Appeal, he must do so at his own risk as to reimbursement of the costs, in the event of failure; and his application for leave to appeal could be granted only upon the usual terms as to giving security for costs under Con. Rules 826 *et seq.*

McBrayne, for the applicant.

S. Price, for the residuary legatees.

[11th December, 1897.

In re SHERLOCK.

Appeal—Leave—Status of appellants—Con. Rule 938—Will—Contending beneficiaries—Security on appeal.

An application by the daughters of Samuel L. Sherlock, who were the legatees interested in the bequest in question, for leave to intervene and appeal from the decision of a Divisional Court, 17 Occ. N. 401, and to dispense with the security required by Con. Rule 826.

It was objected on behalf of the residuary legatees, who opposed the application, that the intervention of the applicants raised a question between contending beneficiaries, and that there was no jurisdiction to deal with such a question under Con. Rule 938.

Held, that the question was one which a Master, in taking the accounts and making the inquiries directed to be taken, and made in an administration proceeding, would have jurisdiction to deal with: see form of administration order (No. 157); Con. Rule 953; form of Master's report (No. 84); and if, for the purpose of ascertaining and determining the persons to whom legacies are payable, and the amount of the legacies, it should become necessary incidentally to place a construction on the will, the Master had jurisdiction to do so; and the test of jurisdiction under Con. Rule 938 was whether the question was one which, before the existence of the Rule, could have been determined under a judgment for the administration of an estate or execution of a trust: *Re Davis*, 38 Ch. D. 210; *Re Royle*, 43 Ch. D. 18.

The will having been construed in the first instance favourably to the applicants, but in the Divisional Court adversely to them, they should not be precluded from carrying the question further, if so disposed.

Order made for leave to appeal upon security being given by bond for $200 or by paying $100 into Court.

If the appeal should proceed, the costs of the application to be costs in the cause; if it should not proceed, the applicants to pay them.

J. H. Spence, for the applicants.

J. S. Denison, for the residuary legatees.

[17TH DECEMBER, 1897.

MACDONALD v. CITY OF TORONTO.

Parties—Substitution of plaintiff—Class suit—Dismissal of action—Appeal to Court of Appeal—Security for costs—Time—Extension.

A motion on behalf of the plaintiff for an order substituting a new plaintiff for him, and extending the time for giving security for the costs of the appeal to this Court and for delivering reasons of appeal.

The action was brought by the plaintiff, on behalf of himself and all other ratepayers of the city of Toronto, against the city corporation and R. J. Fleming, to have the appointment of the latter as assessment commissioner declared illegal, etc.

On the 11th November, 1897, MEREDITH, J., gave judgment dismissing the action with costs. See 17 Occ. N. 405. Notice of appeal from his decision was given by the plaintiff on the 9th December, 1897.

The plaintiff wished to be a candidate for the office of mayor or alderman for the city of Toronto at the next municipal election, and feared that the continuance of the action in his name might disqualify him as a candidate.

The application was opposed by the defendants.

Held, that where a judgment has been pronounced in favour of the plaintiff in a class action, that judgment enures to the benefit of the class, and he cannot deprive the others of that benefit; but not so where the action has been dismissed; the reasons which apply in favour of depriving a plaintiff of the control of a favourable judgment do not exist in the case of an adverse decision. There was no ground upon which, unless by consent of the defendants, an order for substitution could be made in this case.

The plaintiff, however, in the event of his wishing to prosecute the appeal in his own name, was allowed further time to give security and deliver the draft appeal case, together with his reasons for appeal.

Bradford, for the plaintiff.

Fullerton, Q.C., and *W. C. Chisholm*, for the defendants.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 15TH OCTOBER, 1897.

GOSSLING v. McBRIDE.

Arrest—Ca. sa.—Discharge.

Where a debtor is in custody under a writ of *ca. sa.*, the Court cannot make an order for his discharge, except under the Indigent Debtors' Act.

G. W. Lount, for the defendant.

D. Armour, for the plaintiff.

[ARMOUR, C.J., FALCONBRIDGE, J., 8TH DECEMBER, 1897.

MOTHERSILL v. YOUNG.

Libel—Publication—Post-card sent by mail.

A motion by the defendant to set aside the verdict and judgment for the plaintiff for $50 in an action for libel, tried before MACMAHON, J., and a jury at St. Thomas, and to dismiss the action.

The alleged libel was written by the defendant on a post-card, addressed to the plaintiff at Port Stanley, and posted at St. Thomas. The words written were apparently of an abusive and satirical character. The plaintiff was a physician practising at Port Stanley; and the defendant a mail clerk, residing at St. Thomas. The words written seemed to accuse the plaintiff of being a "fakir" and "an amateur doctor."

J. M. Glenn, for the defendant, contended that the sending of a post-card by mail was not publication. In Odgers on Libel and Slander, 3rd ed., p. 78, it is said that there is publication if a message be sent to the plaintiff by telegraph; the contents of the telegram are necessarily communicated to all the clerks through whose hands it passes; so with a post-card. Counsel contended that this statement was not borne out by the authorities cited for it.

J. A. Robinson, for the plaintiff, contra.

The motion was dismissed with costs, the Court holding that the authorities, especially *Williamson* v. *Freer*, L. R. 9 C. P. 393, and *Robinson* v. *Jones*, 4 L. R. Ir. 391, were against the defendant.

[9TH DECEMBER, 1897.

STYLES v. MICHIGAN CENTRAL R. R. CO.

Damages—Remoteness—Animals killed on railway—Negligence of section man.

A motion by the plaintiff to set aside the judgment of Hughes, Co. J., upon the findings of the jury, dismissing an action in the County Court of Elgin, and for a new trial.

The action was brought to recover the value of two horses of the plaintiff killed on the defendants' railway at St. Clair Junction, near St. Thomas. A section man of the defendants drove three stray horses off the line into the plaintiff's field, where his own horses were. The stray horses were breachy, and broke the fence down, escaping upon the highway, and the plaintiff's horses followed them. They got from the highway upon the railway by reason of the cattle-guard being out of repair, and were struck by a train and killed. The jury found that it was not within the scope of the section man's duty to put the stray horses into the field.

J. A. Robinson, for the plaintiff, contended that this finding should be set aside, and that the negligence of the section man was the *causa causans* of the killing of the horses, and at all events that, even if the horses were wrongfully on the road, the defendants were responsible for their getting on the railway, by reason of the cattle-guard being out of repair.

D. W. Saunders, for the defendants, contra.

THE COURT held that the damages were too remote, and dismissed the appeal with costs.

[14TH DECEMBER, 1897.

LEIZERT v. TOWNSHIP OF MATILDA.

Municipal corporations—Accident on boundary road—Joint action—Notice of accident—Time.

An appeal by the plaintiff from the judgment of FERGUSON, J., dismissing the action, which was brought to recover damages for injuries sustained by the plaintiff by an accident upon a boundary road between the township of Matilda and the village of Iroquois. Notice of the accident was given within twenty days, and the action was brought against both the township corporation and the village corporation. Under the recent amendment to the Municipal Act, the notice should have been given to the village corporation within seven days. The trial Judge held that the action was against the defendants jointly, and was defeated by the want of notice to the village in due time.

Held, that the provisions made for notice in s.-s. 1 of s. 531 of the Municipal Act, 1892, as amended, are applicable only to cases of actions brought against a township, city, town, or incorporated village, alone, and not to cases of actions brought against two or more of them. Sub-section 7 of s. 531 was passed to meet the injustice resulting from the law not allowing contribution between co-tort-feasors—see *Sombra* v. *Moore*, 19 A. R. 144—and in the case of two or more municipalities jointly liable for the keeping in repair of a public road, street, bridge, or highway, it provides that there shall be contribution between them as to the damages sustained by any person by reason of their default in keeping the same in repair. This right to contribution is an absolute right given by the statute, and is not limited to the case of an action having been brought by a person who has sustained damages by reason of their default, for the proportion which each is to bear is to be settled either in the action or otherwise, and the claim of the person who has sustained damages might be settled without suit, and still the right to contribution exist. It was no defence for the township, which received due notice, that the village had not received due notice, for the right to contribution of the township from the village did not depend upon such notice having been given to the village, but existed independently of it. The cause of action is still a several one as regards each corporation, although the statute requires that both shall be joined in the action; and although the plaintiff might have failed against the village by reason of want of notice, he might still be entitled, notwithstanding such failure against the village, to recover against the township, which had due notice.

Order made setting aside nonsuit and directing a new trial. Costs of the last trial and of this motion to be paid by the defendants.

Hilliard, for the plaintiff.

W. Johnston, for the defendants.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 20TH NOVEMBER, 1897.

HEATON v. FLOOD.

Chattel mortgage—Omission to renew—Mortgagee taking possession—Sufficiency of—Seizure by execution creditor—57 V. c. 37, ss. 38, 40.

A mortgagee, having omitted to renew a chattel mortgage,

issued and delivered to his bailiff, after the time limited for such renewal, a warrant directing the seizure of the goods, which the bailiff accordingly seized, but left them in the possession of the mortgagor's son, who resided with his father on the premises, and his son-in-law, who resided on the adjoining premises, taking from them an instrument, under seal, whereby they acknowledged that they had received the goods, and undertook to deliver them to the bailiff, when demanded. Subsequently the sheriff, at the suit of a creditor who had obtained execution against the mortgagor's goods, seized the goods in question.

Held, that to make the possession effective, there must be an actual and continued change of possession, and that what took place did not constitute such a possession.

Quære, whether, in any event, the taking of possession, after the time for renewal had expired, could validate the mortgage.

A creditor, prior to the placing of his execution in the sheriff's hands, has no *locus standi* to attack a mortgage.

Clarkson v. *McMaster*, 25 S. C. R. 96, commented on.

Sections 38 and 40 of 57 V. c. 37 do not apply to a case of this kind.

M. Wilson, Q.C., for the plaintiffs.

F. A. Anglin, for the defendants.

[18TH DECEMBER, 1897.

BROCK v. TEW.

Pleading—Embarrassment—Prolixity—Tendering issue—Striking out.

An appeal by the defendant in two actions brought by the same plaintiffs, in respect of different estates assigned for the benefit of creditors to the defendant, from an order of FALCONBRIDGE, J., in Chambers, affirming an order of the Master in Chambers striking out the 10th and 11th paragraphs of the statement of defence. The actions were brought by creditors against the assignee for an account and to obtain dividends upon the estates. The two paragraphs in question set up that the defendant had offered to pay dividends upon certain terms, and set out at great length the correspondence and disputes between the solicitors in relation to such terms.

R. McKay, for the defendant, cited *Stratford Gas Co.* v. *Gordon*, 14 P. R. 407, and *Bank of Hamilton* v. *George*, 16 P. R. 418.

H. Cassels, for the plaintiffs, contra.

THE COURT held that the paragraphs in question tendered no issue, and that prolix pleading of this kind should be discouraged.

Appeal dismissed with costs to the plaintiffs in any event.

[14TH DECEMBER, 1897.

CONNOLLY v. DOWD.

Discovery—Examination of party—Residence out of jurisdiction—Subpœna—Special order.

An appeal by the plaintiff from an order of FALCONBRIDGE, J., in Chambers, affirming an order of the Master in Chambers requiring the plaintiff to attend, at his own expense, for examination for discovery pursuant to a subpœna and appointment served upon him at Toronto for his examination there, he being only temporarily in Toronto when served, his residence being out of the jurisdiction, and he having failed to attend for examination pursuant to the subpœna and appointment.

D. Armour, for the plaintiff, contended that he could not be required to attend upon payment of ordinary conduct money or without a special order, the Rules only providing for the examination at Toronto of parties resident in the county of York.

J. M. Clark, for the defendant Dowd, contra.

Held, that, owing to the changes in the Rules since *Comstock* v. *Harris*, 12 P. R. 17, that case is no longer an authority, and a party residing out of the jurisdiction cannot now be examined in the way that was attempted here: Rules 439, 443, 477.

Appeal allowed with costs to the plaintiff here and below in any event.

MALONE v. MUNDY.

Parties—Action to set aside fraudulent conveyance—Simple contract creditor—Decease of debtor—No representation of estate—Debt barred by Statute of Limitations.

An appeal by the plaintiff from the judgment of ARMOUR, C.J., dismissing the action, which was brought to set aside a conveyance of land to the defendant, made by his wife, since deceased, as fraudulent and void against the plaintiff, who alleged that he was a creditor of the wife in respect of a bill of costs. There was no personal representative of the wife before the Court.

The appeal was dismissed with costs, the Court holding that, even assuming the action was properly framed, it would be useless to set aside the conveyance unless the plaintiff could establish his debt, which appeared to be barred by the Statute of Limitations; and ROSE and MACMAHON, JJ., being of opinion that the action was not properly framed, approving *Gibbons* v. *Darvill*, 12 P. R. 478.

W. L. Ross, for the plaintiff.

T. F. Lyall, for the defendant.

[16TH DECEMBER, 1897.

REGINA v. WALSH.

Liquor License Act—R. S. O. c. 194, s. 54—"Sale or other disposal"—Gift—Construction of statute—Summary conviction.

Motion to quash a summary conviction of the defendant by the police magistrate for the city of Ottawa for "disposing of" intoxicating liquor upon the defendant's licensed premises during prohibited hours. The question raised was whether under s. 54 of the Liquor License Act, R. S. O. c. 194, upon the facts found by the magistrate, there was an offence at all. The magistrate found that the defendant gave the liquor away to friends in his hotel on a Sunday; that there was no sale or disposal in the nature of a sale, and no request from the persons to whom it was given. The defendant contended that the words of the section "sale or other disposal" did not include such a gift.

THE COURT held that the word "disposal" was to be taken in its natural sense, uncontrolled by the word "sale," which preceded it, and so taken was wide enough to include a gift. The object of the enactment was to keep licensed premises closed in certain hours, to forbid any intoxicating liquor being poured out in such hours. The provisions of ss. 57 and 59 of the Act, with regard to liquor on polling days and liquor on boats, were in *pari materia*, and a construction must necessarily be put upon those sections which would forbid the giving away of liquor on polling days or on ships.

MEREDITH, C.J., called attention to the word "other" preceding "disposal" in s. 54, which implied that the disposal must be something different from a sale.

ROSE, J., referred to Maxwell on Statutes, 2nd ed., p. 418, as to the rule of construction, and to *State of Minnesota* v. *Dey-sting*, 33 Minn. 102, as a case very similar to this.

Motion dismissed with costs.

Haverson, for the defendant.

Langton, Q.C., for the Crown.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 18TH DECEMBER, 1897.

LEA v. LANG.

Security for costs—Order for—Application to set aside—Terms—Payment of costs—Form of order—Dismissal of action.

An appeal by the plaintiff from an order requiring him to give security for costs, upon the ground that the costs of a former action brought by plaintiff against defendant for the same cause were unpaid, was dismissed by a Judge in Chambers, and a further appeal by a Divisional Court, which held, 17 P. R. 208, that the plaintiff could not answer the application for security by showing that the former action was brought without his authority. The costs of the appeals were made payable to the defendant in any event. The plaintiff, upon application in the former action, then had the judgment for costs against him therein set aside, upon the ground that the action was brought without his authority; and afterwards applied to set aside the order for security for costs.

Held, that the Master in Chambers, in setting aside the order for security for costs, had discretion to impose terms, and the terms imposed, viz., payment by the plaintiff of the costs of obtaining the order for security, of the appeals therefrom, and of the application itself, were competent and proper.

As to the form of the order, a dismissal of the action, in the event of security not being given within a limited time, was authorized by Con. Rules (1888) 1243 and 1246.

N. F. Davidson, for the plaintiff.

Aylesworth, Q.C., for the defendant.

O'CONNOR v. GEMMILL.

Solicitor—Services in Exchequer Court of Canada—Agreement with client—Compensation en bloc—Invalidity—Champerty—Ascertainment of proper compensation—Taxation of bill of costs—Quantum meruit.

The action was against a firm of solicitors for an account of moneys received by them for the plaintiff in respect of a claim against the Crown, for which action was brought by them for the plaintiff in the Exchequer Court of Canada, and the claim compromised. In answer to the action, the defendants set up an agreement with the plaintiff by which they were to receive for their services one-fourth of the amount recovered for her. This agreement was attacked by the plaintiff as champertous and otherwise void. By a consent judgment a reference was directed to a taxing officer, who found that the agreement was invalid, and that the defendants should deliver a bill of costs for their services, which should be taxed.

Held, that the agreement was invalid, and was no bar to the investigation of what was fairly due to the defendants.

Ball v. *Warwick*, 50 L. J. N. S. Q. B. 382, and *In re Attorneys and Solicitors Act*, 1 Ch. D. 573, referred to.

The solicitors were not engaged or doing business as officers of the Courts of Ontario, and were not acting under the provisions of the Solicitors Act, R. S. O. c. 147. Their services were rendered as solicitors of the Exchequer Court of Canada. Though they obtained their status as solicitors of that Court because they were already solicitors in Ontario, yet their acts were not as solicitors in any Court in this Province, and they

were not subject to the summary jurisdiction affecting officers of the Ontario Courts, nor to the special restrictions and rules affecting solicitors' costs and charges found in s. 31 *et seq.* of R. S. O. c. 147.

Williams v. *Odell*, 4 Pri. 279, *Re Anonymous*, 19 L. J. N. S. Ex. 219, and *Re Johnson*, 37 Ch. D. 433, 15 App. Cas. 203, referred to.

The solicitors must be left to the remedies given by the general law, *i.e.*, in the absence of a tariff of costs between solicitor and client in the Exchequer Court, they must recover upon a *quantum meruit*, and upon such evidence as was appropriate in the forum of litigation, in this case the Province of Ontario.

Paradis v. *Bossé*, 21 S. C. R. 419, and *Armour* v. *Kilmer*, *ante* 401, referred to.

F. A. Anglin, for the plaintiff.

Arnoldi, Q.C., for the defendants.

CLARRY v. GRAND TRUNK R. W. CO.

Railways—Passenger—Contract to carry—Continuous journey—Break in railway—Omnibus transfer—Demand of fare—Refusal to carry—Damages—Costs.

The plaintiff was a passenger by the defendants' railway under a contract by which the defendants were to carry him by continuous journey from Harrisburg to Stratford *viâ* Galt and Berlin. There was a break in the line of the defendants at Galt, where the river had to be crossed, the distance between the stations being three-fourths of a mile. The defendants advertised that there was an omnibus transfer at Galt. The plaintiff was asked to pay a fare of ten cents for the omnibus at Galt, but refused to do so, and was not permitted to be transported free from station to station. He failed to make his connection, and brought this action for damages.

Held, that the import was that the passenger was to be carried the whole distance; he was not called on to walk; and it was the business of the defendants to see that he was conveyed this distance free of expense.

Held, however, that it would have been reasonable for the plaintiff to have paid the ten cents and made his connection, and the damages should be restricted to that sum.

Hawkins v. *Great Northern R. W. Co.*, 1 H. & N. 408; *Hobbs* v. *London and South Western R. W. Co.*, L. R. 10 Q. B. 111; *Craig* v. *Great Western R. W. Co.*, 24 U. C. R. 509; and *Knight* v. *Pollard*, 56 Me. 241, referred to.

Held, also, that the plaintiff was entitled to costs, as the action was brought to test a right.

J. Bicknell, for the plaintiff.

W. Nesbitt, for the defendants.

MILES v. ANKATELL.

Fixtures—Wooden building—Removability—Mode of use—Constructive attachment to soil.

In an action upon a mortgage, the plaintiff claimed foreclosure and a declaration that a certain erection upon the mortgaged premises, placed there by one of the defendants, the husband of the owner of the equity, was affixed to the freehold and part of the mortgage security.

The building in question was a small wooden structure of thin clap-board, lathed and plastered, and divided into three rooms, placed on loose bricks laid on the soil, which was perhaps somewhat levelled to make a foundation for it. It was first used as a shop or store, and then turned into a dwelling-house, and this was rented for a while by the mortgagor and her husband. The building could easily be moved, and little or no injury would be done to the soil.

Held, that it was not in fact affixed or annexed to the soil, but was merely a chattel which might be moved at any time: *Wansbrough* v. *Malins*, 4 A. & E. 884, and *Wiltshear* v. *Cotterill*, 1 E. & B. 689.

If it was a chattel, then, according to the rule suggested in *Holland* v. *Hodgson*, L. R. 7 C. P. 334, 335, the onus was on the plaintiff to show that it could not or ought not to be removed as against him. So far he showed nothing, and the evidence of intention with which it was placed on the ground by the husband, and the other circumstances of its temporary and unsightly character, repelled the conclusion that it was to be deemed constructively attached to the freehold.

W. J. Clark and *G. H. Galbraith*, for the appellant.

J. Bicknell, for the plaintiff.

[22ND DECEMBER, 1897.

REGINA v. CONLIN.

Criminal law—Larceny from the person—Sentence—Police magistrate—Jurisdiction—Consent—Criminal Code, ss. 344, 783, 785, 787.

The charge against the defendant was that he, at the city of Hamilton, did unlawfully steal one purse containing $3.48 in money from the person of Mrs. G. A. Rose.

The defendant consented to be tried, and was tried, before the police magistrate for the city of Hamilton. He pleaded "guilty," and was sentenced to three years' imprisonment.

On the return of a *habeas corpus* it was contended on behalf of the defendant that there was no power to impose on him for the offence a sentence in excess of that provided for by s. 787 of the Criminal Code, namely, imprisonment for a term not exceeding six months.

The contention on the part of the Crown was that the case did not fall under the provisions of s. 787 or 788, but under s. 344, and that the punishment for it might have been as great as fourteen years' imprisonment.

Held, that the fact that "larceny from the person" is omitted from clause (*a*) of s. 783, leaving that offence specifically provided against by s. 344, indicates an intention to have the offence punishable under s. 344, which is the section applicable to the case here; but if there was any conflict or difference between s. 783 and s. 344, the specific provisions in s. 344 would prevail over any general provisions in the other section.

And the offence being thus one to be dealt with under s. 344, the Court of General Sessions of the Peace would have jurisdiction, and the police magistrate the same jurisdiction, under s. 785, there being the consent of the defendant.

DuVernet, for the defendant.

J. R. Cartwright, Q. C., for the Crown.

[MEREDITH, C.J., 13TH DECEMBER, 1897.

FITCHETT v. MELLOW.

Way—Easement—Way of necessity—Physical inaccessibility—Convenience.

The defendants in an action for trespass to land set up that

a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they contended that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of utilization without an unreasonable expenditure of money, and not sufficient for the reasonable purposes of the owner of the lands.

Held, that this contention was not maintainable.

The appellation "a way of necessity" indicates that it is founded on necessity, not on convenience. Some confusion has arisen upon the authorities from failing to distinguish between a way of necessity, properly so called, and quasi-easements which pass or are reserved under certain circumstances, where the reasonable enjoyment of the land with which they have been held to pass, could not be had by the grantee if they did not pass with the land.

Dictum of Lord Mansfield in *Morris* v. *Edgington*, 3 Taunt. at p. 31, and of Bowen, L.J., in *Bayley* v. *Great Western R. W. Co.*, 26 Ch. D. at p. 458, referred to.

The foundation of a right to a way of necessity is the fact that the lands conveyed are physically inaccessible except by passing over other lands.

Clute, Q.C., and *U. M. Wilson*, for the plaintiff.

W. R. Riddell and *G. F. Ruttan*, for the defendants.

[15TH DECEMBER, 1897.

LIGHT v. HAWLEY.

Chattel mortgage—Validity of—Security taken in name of trustee—Affidavit of bona fides—Conversion of goods—Damages—Measure of—Amendment—Adding claim—Pleading.

A chattel mortgage to secure a debt was made to a nominee of the creditor as trustee for him. In an action by an assignee of the mortgage against the assignee for the general benefit of creditors of the mortgagor, for conversion of the mortgaged

chattels, it was contended that the mortgage was invalid, because the mortgagee could not properly make the usual affidavit of *bona fides*, as there was no debt due to him.

Held, notwithstanding there was nothing on the face of the mortgage to show the fiduciary position of the mortgagee, that the mortgage was valid.

Brodie v. *Ruttan*, 16 U. C. R. 207, applied and followed.

At the time the goods were taken by the defendant out of the plaintiff's possession, they were in the hands of the bailiff of the latter for sale under the power contained in the mortgage, and when the defendant intervened and sold as assignee, the same bailiff conducted the sale, and the amount realized was the same as would have resulted from a sale under the power.

Held, that the plaintiff was entitled to recover as damages for the conversion no more and no less than was realized by the sale.

A part only of the goods which the defendant took out of the possession of the plaintiff's bailiff was sold; from the remainder of them the defendant realized nothing, claims having been made to them by other persons, which the defendant did not contest, though he did not actively take part in handing them over to the claimants. The plaintiff, having in his pleading limited his claim to the goods actually sold, was at the trial refused leave to amend by adding a claim for the other goods.

Clute, Q.C., and *John English*, for the plaintiff.

J. L. Whiting, for the defendant.

[FERGUSON, J., 18TH DECEMBER, 1897.

VIDEAN v. WESTOVER.

Life insurance—Benefit certificate—"Ordinary beneficiary"—Reapportionment by will—Validity—60 V. c. 36, ss. 151, 159, 160—Retroactivity.

A life insurance certificate on its face made the sum of $500 payable to the daughter-in-law of the assured, but the latter subsequently, by his will, professed to make a change in the beneficiaries, leaving her out altogether. The certificate was issued, the will made, and the death of the assured occurred before the passing of 60 V. c. 36 (O.)

Held, that ss. 151, 159, and 160 of that Act applied to the certificate and declaration made by the will, and by these sections the assured had power to do as he professed to do by the will, the daughter-in-law being an "ordinary beneficiary;" and the reapportionment made by the will was valid.

C. J. Holman and *H. J. Dawson*, for the plaintiffs.

Tremeear, for the defendant.

[ROSE, J., 17TH NOVEMBER, 1897.

SUTHERLAND v. DANGERFIELD.

Mortgage—Second mortgagee and owner of equity of redemption—Right to recover value of timber cut.

Held, that the assignee of a second mortgage, who had acquired the equity of redemption in the land, but who had never been in possession, nor entitled to be so, the first mortgage being in arrears, and the land not of sufficient value to pay it off, could not maintain an action to recover the value of timber cut by a person, acting under an agreement, made with the consent of the first mortgagee, by the mortgagor's wife, who had not barred her dower in either mortgage, and was in possession of the land.

D. B. Maclennan, Q.C., for the plaintiff.

B. Morton Jones, for the defendant.

[FALCONBRIDGE, J., 26TH NOVEMBER, 1897.

BARBER v. CRATHERN.

Bankruptcy and insolvency—Preferential assignment of security by insolvent —Attack by creditor—Right of attacked creditor to share in proceeds.

When proceedings are taken under s. 7 (2) of R. S. O. c. 124, in the name of the assignee for creditors, by a creditor on behalf of himself and all other creditors who, within a limited time, should come in and contribute to the risk and expense of an action to set aside as preferential a security held by another creditor, the latter may, while defending his security, join with the attacking creditor in indemnifying the assignee, so that, in

the event of his failing to retain his security, he may participate in the fruits of the litigation.

E. Saunders, for the petitioner.

Shepley, Q.C., for the plaintiff.

William Macdonald, for the defendant.

[STREET, J., 20TH NOVEMBER, 1897.

McCANN v. CITY OF TORONTO.

Municipal corporations—Municipal building—Accident—Liability—Relief over.

Before a building which was being erected for a municipal corporation had been taken over, a trap-door in the roof, through the want of fastenings, was blown off, injuring the plaintiff, who was passing in the street below. The trap-door was a necessary part of the work under the contract, which required all work to be done in a good workmanlike manner, and imposed responsibility on the contractors for all accidents which they might have prevented. Damages were recovered by the plaintiff against the corporation on the findings of the jury that there was negligence on its part, and that the specifications did not stipulate for fastenings. The corporation, having paid the damages, sought to recover them over against the contractors, who, in an action against the city, had been brought in as third parties, but on the terms that the findings in such action should be binding on them only as to the amount of damages, and that the question of their liability should be afterwards tried.

Held, that, under the circumstances, the defendants were not entitled to recover against the contractors.

Fullerton, Q.C., for the defendants.

J. E. Jones, for the third parties.

[MEREDITH, J., 17TH DECEMBER, 1897.

STYLES v. THE SUPREME COUNCIL OF THE ROYAL ARCANUM.

Life insurance—Action—Time—Ontario Insurance Act, 60 V. c. 36, s. 148 (2)—Enabling statute.

The words of s. 148 (2) of the Ontario Insurance Act, 60 V.

c. 86, "notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year," have reference to a stipulation or agreement giving less time than one year for bringing the action. It is an enabling, not a disabling, enactment.

D. B. Maclennan, Q.C., and *Adam Johnston*, for the plaintiffs.

Aylesworth, Q.C., and *D. F. MacWatt*, for the defendants.

IN CHAMBERS.

[BOYD, C., 20TH DECEMBER, 1897.

MORPHY v. FAWKES.

Costs—Scale of—Action to set aside fraudulent conveyance—Amount of subject-matter.

An action by simple contract creditors, the amount of whose claim was less than $200, suing on behalf of themselves and all other creditors to get judgment and equitable execution against the lands of the debtor conveyed to a third person in alleged fraud of creditors. It appeared that the land was worth more than $200, and that the claims of execution creditors exceeded $600 in the aggregate.

Held, that the amount of the subject-matter involved exceeded $200, and the costs should be taxed on the higher scale.

Hall v. *Pilz*, 11 P. R. 449, *Dominion Bank* v. *Heffernan*, *ib.* 504, and *Forrest* v. *Laycock*, 18 Gr. 611, followed.

B. E. Swayzie, for the defendants.

W. R. Smyth, for the plaintiffs.

[MEREDITH, C.J., 10TH DECEMBER, 1897.

In re LOTT v. CAMERON.

Prohibition—Division Court—Amount in dispute—Unsettled account—Apparent want of jurisdiction—Part prohibition.

An application by the defendant for an order prohibiting the plaintiffs, the clerk of the 1st Division Court in the county of

Lambton, and the sheriff of that county, from further proceeding in a plaint in that Court by J. M. Lott & Co. against the applicant, and especially under a writ of *fi. fa.* dated 4th April, 1895, commanding the sheriff to levy the amount of the judgment therein, with interest and costs, out of the lands of the defendant, and directing the repayment by the plaintiffs and the sheriff of $93, the amount for which the lands of the applicant were sold under the writ.

The plaint was begun on the 9th March, 1895. The summons stated the plaintiffs' claim to be $109.73, the amount of an account, with interest. The account, as shown by the particulars, was a debit and credit one, consisting on the debit side of a number of items aggregating $456.50 for flour supplied, and on the credit side of items of cash payments amounting in all to $361.50, and showing a balance of $95, to which was added $14.73 for interest, making $109.73, the amount claimed. Judgment for the plaintiffs was signed for default of a dispute note.

By s. 70, s.-s. 1 (*b*), of the Division Courts Act, R. S. O. c 51, there is jurisdiction in a Division Court to hear and determine all claims and demands, etc., where the amount or balance claimed does not exceed $100; and by s. 77 it is provided that no more than $100 can be recovered in any action for the balance of an unsettled account, and also that such an action cannot be maintained where the unsettled account in the whole exceeds $400.

Held, that the want of jurisdiction in the Division Court did not appear on the face of the proceedings. For all that appeared, the account, though exceeding $400, might have been a settled account, and the balance of $95 might have been an admitted balance. If the objection had been raised at the trial, the Judge could have entered upon the inquiry as to whether the whole account was a settled one, and as to whether the balance claimed was an admitted or settled balance. The effect of s. 77 is to exclude the general jurisdiction conferred by s. 70, s.-s. 1 (*b*), where it is made to appear that the account in respect of which the balance is claimed is an unsettled one, but, until that does appear, the jurisdiction to entertain the claim is unaffected. It is only upon the hypothesis that, upon reading the particulars, it is apparent that the balance claimed is not an

agreed balance, and that the account is an unsettled one, that want of jurisdiction can be said to be apparent on the face of the proceedings, and such an assumption was not warranted in this case, the particulars being silent on both points.

But, on the other branch of the case, it was apparent on the face of the proceedings that the amount claimed was beyond the jurisdiction of Court. However, the claim for interest was clearly severable from the rest of the claim, and the prohibition should be limited to that part of the claim which brought it up to an amount in excess of $100: *Trimble* v. *Miller*, 22 O. R. 500; *Broad* v. *Perkins*, 4 Times L. R. 775.

Order for prohibition as to the amount of the judgment debt in excess of $100. No costs to either party.

C. J. Holman, for the defendant.

J. H. Moss, for the plaintiffs.

[FERGUSON, J., 3RD DECEMBER, 1897.

BARTRAM v. LONDON FREE PRESS PRINTING CO.

Security for costs—Libel—Newspaper—R. S. O. c. 57, s. 9—Contentious affidavit in answer.

Upon an application for security for costs made under R. S. O. c. 57, s. 9, by the defendants in an action for an alleged libel contained in a public newspaper, the plaintiff desired to read and have the benefit of an affidavit made by himself contradicting the statements in the affidavit of the agent of the defendants on which the motion was based, and contended that the object was not to try the facts on affidavits, but to show that the agent had not knowledge of the facts, that many statements made by him were not true, and therefore that his affidavit was not such as required by s. 9.

Held, that the plaintiff's affidavits could not be read or used upon the application.

The plaintiff, in person.

A. B. Cox, for the defendants.

[16TH DECEMBER, 1897.

In re CHEESBROUGH.

Life insurance—Declaration by will in favour of children—Identification of policies.

A motion by certain creditors, by way of originating notice under Rule 938, for advice as to the disposition of insurance moneys in the hands of the executors of the will of the late A. H. Cheesbrough, upon whose life the insurances had been effected. The proceeds of three policies, amounting to $6,500, were in dispute. The executors said that this money, or the greater part of it, was required for the payment of the testator's debts. No beneficiaries were designated in the policies; but by his will the testator devised and bequeathed all his property, "including life insurance policies," upon trust to pay the income for education and maintenance of his children until majority, and to pay the corpus to them at majority. There was no further identification of the policies.

Held, that a specific identification of the policies by number, by name, by date, or amount issued, was not necessary in a case where the testator had given all his policies of insurance for the benefit of his children. The policies meant seemed to be made entirely certain in this way, and there was no room for doubt or mistake. The children of the testator were entitled to the benefit of these three policies, and the moneys arising from them were not available to the creditors.

Langton, Q.C., for the applicants.

A. Hoskin, Q.C., for the executors.

A. J. Boyd, for the official guardian.

[ROSE, J., 7TH DECEMBER, 1897.

HERMANN v. MANDARIN GOLD MINING CO.

Notice of trial—Irregularity—Close of pleadings—Service of papers—Waiver.

An appeal by the plaintiff from an order of the Master in Chambers striking out the notice of trial on the ground that the pleadings were not closed when the notice was served.

On the last day for delivering the statement of defence, which was also the last day for serving notice of trial for the Rat Portage Assizes, the defendants filed their defence, a few minutes before four o'clock, and served it at the office of the plaintiff's solicitor about the same time. The plaintiff immediately filed a joinder of issue, and then served it, and also notice of trial, before four o'clock, on the clerk of the defendants' solicitor, in Osgoode Hall. On the same day, but before the defence was filed, the plaintiff also served the joinder and notice of trial at the office of the defendants' solicitor.

Held, that the notice of trial was irregular, for it could not be properly served until after the close of the pleadings; and the service upon the clerk at Osgoode Hall was of no avail; it could only be effective, if at all, from the moment when it reached the solicitor himself.

McIlroy v. *McIlroy*, 14 P. R. 264, followed in preference to *Broderick* v. *Broatch*, 12 P. R. 561.

Held, also, that the issuing by the defendants of an order to produce at the same time that they filed their defence did not waive the irregularity of the notice of trial.

J. F. Edgar, for the plaintiff.

Masten, for the defendants.

[18TH DECEMBER, 1897.

ALEXANDER v. IRONDALE, BANCROFT, AND OTTAWA R. W. CO.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

In an action against an incorporated company to recover a money demand, the defence was that the indebtedness, if any, was not that of the company, but of the president in his private capacity. Upon an application for a better affidavit on production of documents from the company, it had been determined that the company had no documents to be produced.

eld, that upon the examination for discovery of the president as an officer of the company, he could not be compelled to produce documents or books which had been determined not to

be in possession of the company, nor his own books or documents; and a subpœna served upon the president was set aside *quoad* the production of documents which it called for.

Steel v. *Savary*, [1897] W. N. 195, and Snow's Annual Practice, 1897, p. 650 *et seq.*, referred to.

W. H. Blake, for the defendants.

A. C. McMaster, for the plaintiff.

[MEREDITH, J., 30TH OCTOBER, 1897.

DICKERSON v. RADCLIFFE.

Discovery—Patent for invention—Action to restrain infringement—Denial of right—Details of business transactions.

In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a certain patent and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade-libel, the defendants admitted that they bought the drug, but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right.

Held, that, there being a *bona fide* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and selling, so as to disclose them and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary.

J. Bicknell, for the plaintiffs.

J. B. Holden, for the defendants.

[6TH DECEMBER, 1897.

In re MATHERS.

Infant—Trust fund—Payment to guardian—Trustees under will—Application for advice—R. S. O. c. 110, s. 37—Payment into Court.

Where an infant had become entitled to a fund, the subject

of an express trust in her favour under a will, and the fund was claimed in the infant's name by her guardian appointed by a Surrogate Court, but the infant, represented by the official guardian, opposed the claim :—

Held, that it was not a case in which an order should be made under R. S. O. c. 110, s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but that the trustees should be allowed to transfer the fund into Court.

Huggins v. *Law*, 14 A. R. 383, distinguished.

A. Hoskin, Q.C., for the applicants.

W. M. Douglas, for the statutory guardian.

W. Davidson, for the infant.

In the Court of General Sessions of the Peace for the County of Victoria.

[DEAN, CO. JUDGE, CHAIRMAN, 15TH DECEMBER, 1897.

REGINA v. CARLEY.

Criminal law—Obstructing bailiff—Execution of process against goods—Agent of bailiff—Agreement—Criminal Code, s. 144.

Indictment charging the defendant, under s. 144 of the Criminal Code, that he did, at the village of Woodville, unlawfully obstruct one W. H. McLaughlin, bailiff of the 6th Division Court in the county of Victoria, in the lawful execution of a process against goods, to wit, in the lawful execution of a writ of replevin.

At the trial, upon cross-examination, it appeared that the writ of replevin was issued at the suit of Archibald J. Smith against one William T. Moore, and the bailiff, under the writ, had obtained possession of the goods from Moore, the defendant in the action, but had, at Moore's suggestion, left them in possession of the prisoner, taking from the latter an agreement to deliver up the goods to the bailiff when called upon; and that, when the bailiff returned and demanded the goods and attempted to get them, he was prevented by Carley, who resisted his getting them.

Held, that the bailiff was acting under the agreement, and was not a person acting in the lawful execution of any process against goods under the section.

Castle v. *Ruttan*, 4 C. P. 252, and *McIntyre* v. *Stata*, 4 C. P. 248, referred to.

A. P. Devlin, for the Crown.

William Steers, for the prisoner.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, 18TH DECEMBER, 1897.

REGINA v. HORTON.

Summary conviction—Wilfully killing a dog—Penalty—Imprisonment in default—Hard labour—Power to impose—Criminal Code, ss. 501, 872 (b).

The defendant was, on 1st December, 1897, convicted before a justice of the peace for the county of Hants for unlawfully and wilfully killing a dog, and adjudged to forfeit and pay a fine of $10 and $16 costs and $30 compensation, and in default of payment of the penalty to be imprisoned in the common gaol at Windsor, at hard labour, for three months. He was committed on a warrant issued on the conviction, and moved before MEAGHER, J., on the return of a *habeas corpus* issued on his application, for his discharge from custody on a number of grounds, but principally that the conviction and warrant awarded hard labour.

That point having called into question the proper construction of s. 872 (*b*) of the Criminal Code, the matter was referred to the Court, and was argued by *John J. Powers*, for the prisoner, and *J. F. Frame*, for the informant, before MCDONALD, C.J., GRAHAM, E.J., and TOWNSHEND, J.

GRAHAM, E.J.—This is an application for a discharge upon *habeas corpus*. The defendant was found guilty under the Criminal Code, s. 501, of wilfully, etc., killing a dog. That section provides that the guilty person shall be liable, (1) to a pen-

alty not exceeding $100, etc., or (2) to three months' imprisonment, with or without hard labour. But he is not under that section liable to both, or to the latter in default of payment of the former. That section does not specify, as many sections do, what imprisonment the justice may impose in default of the pecuniary penalty in order to enforce payment. When the justice comes to make the conviction and provide for the enforcement of the money penalty, he must look elsewhere.

Section 872 (*b*) deals with this matter and supplies the procedure, and, in my opinion, it deals only with that, namely, the limits and manner of imprisonment which may be imposed "in default of payment of the penalty." There are two branches: first, if the provision for the breach of which the defendant is summoned specifies the manner and limit of imprisonment which may be imposed, then the justice is guided by that; second, if it does not, then this sub-section itself supplies the guide, namely, it provides that the imprisonment is not to exceed three months. In my opinion, this case comes under the second branch; that is to say, s. 501 does not specify "imprisonment or the term of imprisonment," *i.e., which is to follow in default of payment of the penalty.*

It was contended that because s. 501 does enable a fixed term of imprisonment absolute with or without hard labour, then, under the letter of sub-section (*b*), a fixed term with hard labour could be imposed in default of payment of the penalty; that this term of absolute imprisonment is a specification of the manner and time of imprisonment. But there are numerous provisions which prescribe what limit and manner of imprisonment may be imposed in default of payment of the penalty, and this branch of sub-section (*b*) has abundant scope for application in respect to such cases. It is extending it a great deal to make it apply to such a section as this which provides for a sentence of a term of imprisonment by way of punishment.

Then, if the provision for imprisonment is to be found in sub-section (*b*), the limit is three months, but hard labour is not provided for. And, as this defendant was adjudged to pay a penalty of $10, etc., and in default of payment forthwith to be imprisoned, etc., for three months with hard labour, the conviction is bad. The case of *Regina* v. *Turnbull*, 16 Cox C. C. 110, applies.

A writ of *habeas corpus* may issue, and the defendant Hart Horton be discharged, upon the terms of an undertaking that no action shall be brought by him against any person in respect to the proceedings taken against him which resulted in or followed upon said conviction or in respect to said conviction or his arrest, detention, commitment, or imprisonment, or of any other matter which happened to him by reason of the proceedings in the prosecution. No costs.

McDONALD, C.J., and TOWNSHEND, J., concurred.

Rule accordingly.

IN CHAMBERS.

[MEAGHER, J., 11TH DECEMBER, 1897.

REGINA v. CROWELL.

Summary conviction—Penalty—Adjudication of payment instead of forfeiture.

The defendant was convicted and committed to gaol on 15th October, 1897, at Lunenburg, on a warrant reciting a conviction for a violation of the Inland Revenue Act, whereby he was adjudged "to forthwith pay $100, and in default of payment to be imprisoned for six months," etc. On the return of a *habeas corpus* sued out by him, a motion was made for his discharge, on the ground, among others, that the conviction itself, and that recited in the warrant, did not adjudge a *forfeiture*, but merely a *payment* of the penalty imposed.

Held, following *Regina* v. *Newton*, 11 P. R. 98, that the conviction, and the warrant founded on it, were bad, and the prisoner must be discharged, on an undertaking to bring no action against the justice or officers concerned in the execution of the warrant, including the gaoler.

F. T. Congdon, for the prisoner.

F. A. Mathers and *J. A. MacKinnon*, for the informant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 10TH DECEMBER, 1897.

THIBAUDEAU v. SCOTT.

Security for costs—Plaintiff abroad—Judgment at law.

The plaintiff, residing at Montreal, brought a suit to set aside a bill of sale given by S. to the other defendants a few days previous to the recovery of a judgment in the Supreme Court against S. in an action of debt. Upon an application for security for costs by the defendants :—

Held, that the security should be for the benefit of S. as well as the other defendants.

A. H. Hanington, Q.C., for the application.

H. F. Puddington, contra.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 11TH DECEMBER, 1897.

FOSTER v. MUNICIPALITY OF LANSDOWNE.

Municipal corporations—Drainage—Damage by drain—Demurrer to statement of claim—Procedure—Action—Arbitration.

An appeal from the decision of DUBUC, J., 17 Occ. N. 292, was dismissed with costs.

In re TAYLOR AND CITY OF WINNIPEG.

Municipal corporations—By-law—Licensing powers—Regulation of dairies —Inspection—Reasonableness of by-law—Application to quash.

Upon an appeal from the decision of DUBUC, J., 17 Occ. N. 350, the order appealed from was affirmed in the main.

The 17th paragraph of the by-law provided that "Every such licensee shall, at any and at all times when asked by the health officer or veterinary inspector, state fully whence he obtains or has obtained the milk he sells or has been selling."

By the 24th and 28th paragraphs, infractions of the by-law may be punished by cancellation of licenses or the imposition of penalties.

Held, that the effect of these provisions would be that, under threat of liability to a penalty for not giving the information, a licensee might be compelled to make a discovery which would subject him to a penalty. It was not within the power of a municipal council to impose such a condition.

Paragraph 22 provided that "Any milk vendor or person delivering milk to customers in the city shall, upon request by the health officer or health inspector or any of their assistants, permit a sample or samples of milk being so delivered, or intended to be delivered, to be taken for examination."

Held, that this paragraph was *ultra vires* of the council. By taking successive samples, even *bona fide*, the municipal officers might appropriate a quantity of real value. The safe rule was not to take the property of another without compensation; no municipal council, without legislative authority, could thus appropriate the property of individuals.

The 22nd paragraph and part of the 17th should be quashed, but in other respects the order of DUBUC, J., should be affirmed with costs, save the costs of so much of the application and appeal as related to the portions of the by-law quashed, which were not to be allowed to the city, but might be set off by the applicant.

ADAMS v. HOCKIN.

Real Property Act—Compliance with requirements of Act—Sufficiency of description of property and of interest claimed by petitioner—Admission of further evidence on appeal—Conditions imposed.

Appeal from decision of TAYLOR, C.J., 17 Occ. N. 385.

Held, that while the petition did not distinctly state in so many words that the petitioner's claim was to an estate in fee simple in the equity of redemption remaining after the mortgage, or to such an estate in the lands subject to the mortgage, it did set out the facts upon which the petitioner relied as giving him an equity to have the land conveyed to him in fee subject to the mortgage, upon the trusts in the original conveyance, and it prayed for a conveyance to him of the land in terms which would be sufficient in a bill or statement of claim to enforce such an equity. The nature of the claim was clearly set out and the allegations and the prayer would enable the Court to make such a judgment or order as should be made in an ordinary action for the same purpose.

It did not appear that the residence or addition of the caveator in the petition was required to be stated. Neither the Act nor the Rules mention them.

As to the description of the land, it could not be said upon a mere reading of it that it was insufficient. If there had been more than one plan of Oak Lake, an ambiguity might arise, but it could not be presumed that there was.

On behalf of the caveatee it was sought to read an affidavit not previously filed, for the purpose of proving that the description in the petition and caveat differed from that contained in the application for a certificate of title.

From the form of caveat given in Schedule O. to the Act, it would appear that the land should be described in the caveat as in the advertisement relating to the application, if there had been an advertisement, and otherwise, as in the application itself.

Held, under Rule 476 of the Queen's Bench Act, 1895, that the evidence should be admitted, if the respondent were willing, as a condition, to pay the costs o the appeals which had been unsuccessful.

The order of the Court would be that the appeal be allowed and the order dismissing the petition reversed, and that, if within five days after taxation thereof, the respondent in this appeal should pay to the appellant the costs of this appeal and of the original appeal from the referee, the order of the referee directing an issue should be rescinded, and the petition referred back to the referee for further hearing, with leave to the parties to adduce evidence upon the question whether the description of the land in question, as given in the caveat, corresponded with that contained in any advertisement of the application or in the application, and in the event of such costs not being paid within that time, the order of the referee should stand confirmed with such an amendment as would make the description of the land therein correspond to the petition, and that in such case the present respondent, caveatee, should pay to the petitioner, caveator, the costs of both the appeals forthwith upon taxation thereof.

[23RD DECEMBER, 1897.

MASSEY-HARRIS CO. v. WARENER.

Execution—Exemptions—Homestead of debtor conveyed to his wife—Conveyance fraudulent—Lands not exempt—Title not in debtor—Insufficiency of proof of registration of certificate.

An appeal from the decision of BAIN, J., 17 Occ. N. 409, was allowed.

Held, that the plaintiffs must show that they had registered a certificate of their judgment upon which they were proceeding, and there was no evidence of that upon which the Court could act.

An affidavit was filed made by a clerk in the plaintiffs' employment, in which he swore that the plaintiffs caused a certificate of the judgment in the form, or to the like effect of the form, for the same in the schedule of forms to the County Courts Act, signed by the proper officer in that behalf, and under the seal of the said County Court, to be issued and registered in the proper office. How he knew all this did not appear. Whether the certificate registered was in proper form and sufficient to bind the land and properly registered, was a question for the Court, and a properly certified copy should have been produced.

As the plaintiffs had not proved a registered judgment, the appeal should be allowed and the order of the referee dismissing their motion restored, without prejudice to another application or such other proceedings, if any, as the plaintiffs might be advised to take.

No opinion was expressed upon the question of the defendant's right to claim exemption for the land.

INCH v. SIMON.

Chattel mortgage—Affidavit of execution sworn before mortgagee.

The question raised in this case was as to the validity of a chattel mortgage. The affidavit of execution by the attesting witness was sworn before the mortgagee, and the defendant contended that the mortgage was therefore invalid.

Held, that the affidavit of execution having been sworn before a commissioner duly appointed, a person authorized to administer the oath, the mortgage could not be declared void because he was also a person having an interest under the deed.

Pitblado, for the plaintiff.

Bradshaw, for the defendant.

[TAYLOR, C.J., 27TH NOVEMBER, 1897.

GRAHAM v. BRITISH CANADIAN LOAN AND INVESTMENT CO.

Will—Power to sell, but not to mortgage—Fraudulent scheme to carry out mortgage—Cloud on title of beneficiaries—Lien of mortgagees for amounts paid for taxes.

Action commenced, before the Queen's Bench Act, 1895, on the equity side, to have three mortgages held by the defendant company declared fraudulent and void as against the plaintiffs and a cloud upon the title to certain lands.

Margaret Logan, the owner of the lands, appointed W. Sutherland and Barbara L. Barber her executor and executrix, devising to them all her real and personal estate in trust to the use of the children of B. L. Barber, the plaintiffs in the action,

authorizing her executor and executrix to exercise their discretion to sell and dispose of the same in any way they might think proper and invest the proceeds.

Sutherland died. In March, 1881, Mrs. Barber applied to the manager of the defendant company for a loan of $2,000 upon the security of the first parcel of land; soon after, the manager informed her that she had no power to mortgage the land, but suggested, as was alleged, that, having power to sell, she ought to convey the land to some friend, who could execute the mortgage, after which the equity of redemption could be reconveyed to her to hold as before, and it was agreed that such course should be pursued.

Accordingly, by deed dated 14th March, 1881, Mrs. Barber conveyed the first parcel of land to Miss Macdonald for the expressed consideration of $5,000; by a mortgage dated 16th March, 1881, Miss Macdonald mortgaged the same land to the defendants for $2,000; then, by deed dated 17th March, 1881, Miss Macdonald conveyed the equity of redemption to Mrs. Barber. No consideration, it was alleged, passed between Mrs. Barber and Miss Macdonald for either of the conveyances of the 14th and 17th March. On 28th November, 1881, by a mortgage executed by Mrs. Barber and her husband, the first parcel of land was mortgaged to the defendant company for a further sum of $2,000. Default having been made, and the company requiring further security, by a mortgage dated 8th November, 1883, executed by Mrs. Barber and her husband, the first and second parcels of land were mortgaged to the company for $1,200.

The defendant company, by their answer, denied that the manager made such suggestion or arrangement as was alleged, or that the deed and mortgage were executed for the purpose of carrying out any fraudulent design contrary to the provisions and trusts of the will; alleged that the moneys were advanced in the ordinary course of business, in good faith, without notice of the fraud or design alleged in the bill; and claimed the benefit of the Statute of Limitations and of the Registry Act. It was further claimed that they had paid large sums for taxes and premiums of insurance, and that they were, in any event, entitled to a lien for the amount of such payments.

The evidence showed that A. F. McNabb, since deceased, was the local agent of the company in Winnipeg; that he accepted

or rejected loans; and that on his report approving a loan and on the report of the solicitors the money was advanced. The evidence left it doubtful if McNabb suggested the plan which was resorted to, but there was no doubt he was well aware of the plan proposed, and knew it was being carried out. The evidence did not warrant the finding that McNabb was the author of or was the party committing a fraud, but certainly he knew of the existence of the trust. He acquired this knowledge while acting as the agent of the company within the scope of his authority as such, and the company had therefore notice of all he knew.

The company's solicitor who examined and passed the title knew, or ought to have known, that a breach of trust was being committed. He had before him a will under which the executrix had no power to mortgage, only a power to sell. He had a deed made on 14th March by the executrix conveying the property to Miss Macdonald for an expressed consideration of $5,000. With that he had an application to the company made on the same day, by which the grantee applied for a loan of $2,000, valuing at $9,500 the property which she had that very day bought from the trustee for $5,000, with a certificate from the agent and valuator of the company that the property was worth, at a forced sale, $7,000. The applicant, Miss Macdonald, was not in possession, and never had been, but the property had been occupied for years by Mrs. Barber, her husband, and family.

Held, that the company had, through their agent, and must be held to have had through their solicitor, notice of the breach of trust and fraud Mrs. Barber was committing.

The case of the second mortgage could not be distinguished from the first. On the occasion of the first the company had had notice. Could it be said that, on the occasion of the second loan, a few months after, they should be relieved from the effect of that notice, having had all the time in their possession deeds and documents which should have put them on inquiry?

It was said that the plaintiffs had no *locus standi*, for they had no title to the land; that was in the executrix, Mrs. Barber; and she should have been a plaintiff; but the executrix could not take proceedings, for she was a party to the alleged fraud by which the cloud was created: *Travis* v. *Milne*, 9 Ha. 150.

The company should be allowed the moneys necessarily paid out to preserve the property, and without the payment of which it would have been sold for taxes and lost to the plaintiffs.

Mrs. Barber, the executrix, in conveying the land to Miss Macdonald and procuring her to mortgage it to the company, and in herself executing a second mortgage, perpetrated a fraud upon the plaintiffs, of which the company had notice. The plaintiffs were entitled to have the mortgages declared fraudulent and void as against them and a cloud upon their title to the land.

As to the moneys necessarily expended by the company in payment of taxes and to redeem the land when sold for taxes, the parties might be able to agree upon the amount, and if so, it might be inserted in the judgment. If not, there must be a reference to the Master. For the amount when ascertained the company should be declared entitled to a lien or charge on the land.

The plaintiffs would be entitled to the costs up to and including the judgment. If a reference were necessary, the costs of that should follow the result and be added to the plaintiffs' cost, or to the amount found due to the defendants, as the case might be.

Then the plaintiffs' costs and the amount, if any, found due to the company should be set off *pro tanto*, the one against the other.

Upon payment of the amount due, the company, in the event of the balance being found in their favour, or immediately in the event of the balance being against the company, the registration of the mortgages to be vacated and set aside as a cloud upon the plaintiffs' title to the land.

Ewart, Q.C., and *Andrews*, for the plaintiffs.

Mulock, Q.C., for the defendant company.

[Bain, J., 6th December, 1897.

WILTON v. MURRAY.

Water and watercourses—Surface water—Lands of different levels—Absence of a marked channel—Right to stop flow of water on to one's own land.

The plaintiff was the owner of a quarter section, and the defendant owned a quarter section adjoining.

The plaintiff claimed that a watercourse ran through her land into and across the defendant's land, and that for some years the defendant had obstructed the flow of water in this watercourse by building a dyke or embankment across it on his own land, the effect of which had been to throw the water back on and overflow the plaintiff's land, and she asked that the defendant be ordered to remove the obstruction and be restrained from obstructing the watercourse in the future.

The natural drainage or watershed of the plaintiff's land and of several sections to the west and south of hers was across the defendant's land into a slough or gully in his land that ran into Long Lake. Along the westerly part of plaintiff's land there was what was called a "depression" extending through the quarter section and crossing into the defendant's land, continuing through it till it reached the slough. The fall in the level was very slight. At the south line of the plaintiff's land the depression extended nearly half way across the quarter section, and it gradually narrowed in its northern direction to a width of about 300 feet, where it crossed into the defendant's land. There was no continuous flow of water through this depression, but every spring the surface water coming from the snow melting on the lands south and west of the plaintiff's flowed or drained into the depression, and, covering it to a depth of six inches or more, gradually drained off, in the absence of obstruction, across the defendant's land, into the slough. In high water the northerly flow of the water through the depression was spoken of as being perceptible for a few days, and it was said that the height of the water on the slope of the depression and the general course of its flow was defined by the rubbish that was deposited along the edge of the current; apart from this there was no evidence of the existence of any banks or edges of a channel through which the water flowed. In some years the plaintiff had cultivated portions of this depression up to her western line.

Held, that the plaintiff had failed to prove her contention that a watercourse passed through her land into the defendant's. A watercourse has been defined to consist of bed, banks, and water; and while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground. Here there was no evidence of the

water flowing in a course with defined and visible banks. The case was one of the drainage of surface water, produced by snow and rain, and the plaintiff had no right of action against the defendant for obstructing the drainage of this surface water on to his land; and the damage that this obstruction caused the plaintiff was *damnum absque injuria*.

A right of drainage does not exist *jure naturæ;* where two parcels of land belonging to different proprietors adjoin one another, the lower one owes no servitude to the upper to receive the surface water naturally draining off the latter: *Rawstron* v. *Taylor*, 11 Ex. 369; *Williams* v. *Richards*, 23 O. R. 651; *Ostrom* v. *Sills*, 24 A. R. 526. The lower proprietor may protect himself by the erection of an embankment or other obstruction on his own ground, though the effect may be to turn the water back upon and overflow the lands of the neighbouring proprietor.

Action dismissed with costs.

Anderson, for the plaintiff.

Cooper, Q.C., for the defendant.

[22ND DECEMBER, 1897.

CARRUTHERS v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Power of sale—Improvident exercise of—Sale at under-value—Damages.

The plaintiff sued to recover damages which he claimed he had sustained by reason of the defendants having improperly and improvidently exercised the power of sale contained in two mortgages made by him.

The property in question was in the Portage Plains, distant from Portage la Prairie about five miles. On the 1st March, 1895, when the sale took place, there was due by the plaintiff on the two mortgages $2,303.36; the property was sold for $2,800, the purchaser to pay $43.97 for taxes. The plaintiff alleged the property was of much greater value than the price for which it was sold, and that it was owing to the defendants not having taken reasonably prudent means to effect a beneficial sale that the property was sacrificed. The special grounds of

complaint were that the sale was not sufficiently advertised, and that it was held at Brandon instead of at Portage la Prairie.

The sale was advertised by inserting a notice of it in the Brandon Weekly *Times* for three successive weeks before the sale, and by distributing posters with the notice of the sale both in Brandon and Portage la Prairie. The Brandon paper was not shown to have had any circulation in the Portage district. The farm was a good one, and at the time of the sale there were a dwelling-house and several outbuildings on it, 100 acres were ploughed and ready for seeding; but in the notice of the sale, which contained also a notice of the sale of two town lots in Brandon, the land was described merely by section, township, and range. Not only was there no mention of the improvements, but the statement in the advertisement, that "the vendors are informed that on parcel 1 there is a two-storey brick dwelling-house," was apt to suggest the inference that the other parcel advertised was without improvements.

That the price realized was less than the value of the farm was shown by the fact that the purchaser resold the place within a week for $3,500. The fair market value was at the least $4,000.

Held, that the defendants exercised their power of sale without taking the precautions they reasonably should have taken to effect an advantageous sale, and that, as the property was sold for an under-value, the defendants were liable to make up to the plaintiff what he had lost by their default. The inference could not be avoided, either that the defendants were actuated by some other motive than a *bona fide* desire to effect a sale to the best advantage at the auction, or that they so carelessly and negligently exercised their power that there was the want of the reasonable precautions that the law demanded. If the sale had been properly conducted, $3,700, including taxes, might have been obtained, and the defendants were liable to make good to the plaintiff the difference between $3,700 and $2,843.97.

The plaintiff was overpaid $32.25, for which the defendants counterclaimed, and the defendants should have credit for this amount.

Judgment for the plaintiff for $823.78 with costs.

Aldrich v. *Canada Permanent L. & S. Co.*, 24 A. R. 193; *Faulkner* v. *Equitable Reversionary Society*, 4 Dr. 352; *Prentice*

v. *Consolidated Bank*, 13 A. R. 69; *Richmond* v. *Evans*, 8 Gr. 508; and *Kennedy* v. *DeTrafford*, [1897] A. C. 180, referred to.

Colin H. Campbell, Q.C., for the plaintiff.

A. D. Cameron, for the defendants.

PRINCE EDWARD ISLAND.

In the Supreme Court.

[FULL COURT, 13TH DECEMBER, 1897.

REGINA v. MORRIS.

Canada Temperance Act—"Sale" of intoxicating liquors—Purchase of imported liquors in customs warehouse.

An application for a writ of *certiorari* to quash a summary conviction of the defendant for selling, in Charlottetown, on the 22nd February, 1897, spirituous liquors, in violation of the Canada Temperance Act, then and there in force.

The defendant imported a quantity of spirituous liquors, which he duly entered at the customs house, and which, at his instance, were placed in the customs warehouse in Charlottetown. While the goods were in the warehouse, the defendant, by a writing signed by him, transferred the liquors to one Bernard Callaghan, who paid the duty, obtained possession of the liquors, had them removed to his own premises in Charlottetown, and gave the defendant his promissory note in payment of the price.

It was contended that this transaction was not a "sale" in contravention of the Act.

SULLIVAN, C.J.—The goods in question had reached Charlottetown, were entered by Morris, and at his instance were placed in the customs warehouse, which was equivalent to his taking actual possession of them. They were held in the warehouse for Morris, and as his property. As between Morris and his consignor, the goods were then Morris's property, subject to the duty payable to the Crown: *Wiley* v. *Smith*, 2 S. C. R. 1.

Morris, then, being the owner of the goods, transferred them to Callaghan, who gave Morris his promissory note in payment of the purchase money, paid the duty, and, in pursuance of Morris's transfer, took possession of the liquors, and removed them to his own premises in Charlottetown. That transaction changed the property in the liquors from Morris to Callaghan, or, in other words, constituted a sale by Morris to Callaghan, notwithstanding the fact that the duty was paid by Callaghan, and not by Morris: Benjamin on Sales, 3rd ed., p. 852: *Hind* v. *Whitehouse*, 7 East 558; *Haig* v. *Wallace*, 2 Hud. & B. 671.

The sale of spirituous liquors having been thus accomplished, it was proved before the magistrate. No evidence was submitted by the defendant to show that he had good reason for believing that the liquors would be forthwith removed beyond the limits of Charlottetown, and of any adjoining county or city in which the second part of the Canada Temperance Act was in force, under s. 99, s.-s. 9. The magistrate, therefore, properly convicted the defendant, and the conviction must be affirmed.

FITZGERALD, J., concurred.

HODGSON, J., dissented, holding that the intoxicating liquor, the sale of which constituted a breach of the statute, was not liquor on board ship, or locked up in the Queen's warehouse, but liquor, the subject of present dealing, which might be used for the promotion of intemperance.

YOUNG v. McISAAC.

Trespass to land—Foreshore of sea—Rights of owner of adjacent land—Right to gather sea-weed—Way of necessity—Impassable public highway.

Motion to make absolute a rule *nisi* to set aside a verdict entered in favour of the plaintiff or for a new trial.

The action was for trespass to land and trover for hauling loads over the plaintiff's land in proximity to a disused road along the bank of the shore of the straits of Northumberland, and for taking and converting sea-weed and kelp lodged by the tide on the foreshore in front of the plaintiff's farm.

The jury found that the defendant had gathered sea-weed opposite to the plaintiff's land, and that the plaintiff's damage thereby was $1; that the public had a right to travel over the

old road, but the sea had so eaten into it that it was impossible to get upon it without going over the plaintiff's land; that when the defendant went over the plaintiff's land, he did no unnecessary injury; that if the defendant had no right to go on the plaintiff's land, the plaintiff's damage thereby was ten cents; and that the defendant would have had only 200 yards further to go if he had hauled the sea-weed by a certain new road.

A verdict was entered for the plaintiff for $1 on the trespass and trover count for taking sea-weed, and for ten cents on the trespass count for going over the plaintiff's land.

SULLIVAN, C.J.—The substantial questions resulting from the trial, and which completely dispose of the case, are:—

1st. Whether the plaintiff, by reason of his farm being bounded by the shore, has the exclusive right to take the sea-weed and kelp deposited by the action of the tide on the foreshore in front of his land, between ordinary high and low water mark.

2nd. Whether, in the circumstances of this case, the defendant could lawfully travel on the plaintiff's land as over a way of necessity, on account of the road along the bank having in part fallen away and become impassable.

With respect to the first question, it was contended that such sea-weed and kelp belong to the riparian proprietor, and the plaintiff, as such proprietor, had the exclusive right to them.

[The learned Chief Justice then referred to and distinguished the case decided by his own Court in 1864, *Regina* v. *Lord*, 1 H. & W. 245; and referred also to *Eman* v. *Turnbull*, 2 Johns. (N. Y.) 318; Gould on Waters, p. 59; *Anthony* v. *Gifford*, 2 Allen 549; *Howe* v. *Stawell*, Alc. & Nap. 348; *Brew* v. *Haren*, 9 Ir. C. L. R. 198; *Mulholland* v. *Killen*, Ir. R. 9 Eq. 471; *Healey* v. *Thorne*, Ir. R. 4 C. L. 495. He then proceeded:]

The authorities to which I have referred clearly establish that the right to and ownership in sea-weed and kelp cast upon the seashore are in the owner of the soil of the foreshore on which they are deposited; but, in order to constitute such right and ownership, they must be deposited on the land of the claimant, and not on the foreshore opposite to it, as contended.

What is comprised in the term "seashore?" In *Blundall* v. *Catterall*, 5 B. & Ald. at p. 304, Bayley, J., defines it thus: "By 'seashore' I understand the space between the ordinary

high and low water mark, and the property in this is *prima facie* in the King. It may, indeed, by grant or prescription, belong to a subject, but, until the contrary is shown, the presumption is that it belongs to the King."

To whom does the foreshore in question in this case belong? It does not appear by the pleadings that the plaintiff claims the ownership of its soil. The declaration shows that his land is bounded by the shore of the straits of Northumberland. Such boundary does not give him the soil of the foreshore; it gives only to ordinary high water mark: Gould on Waters, p. 385; *Trustees of Duke of Bridgewater's Estates* v. *Surveyors of Highways of Booth-cum-Linacre*, L. R. 2 Q. B. 4; *Locke* v. *Cleveland*, 1 Allen (N. B.) 390.

There being no evidence to show that the foreshore in question is vested in the plaintiff, either by grant or prescription, the conclusion must be that it does not belong to him, and the presumption is that it is vested in the Crown. The plaintiff, then, not being the owner of the soil of the foreshore, had no right to the sea-weed and kelp in question. They belonged to the Crown as the owner of the soil on which they were found, and the plaintiff could not maintain an action of trespass or trover against the defendant for taking them from the Crown's foreshore. This branch of the case must, therefore, be decided in favour of the defendant.

As to the second question, the rule of law is well settled that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining land without being guilty of trespass: *Taylor* v. *Whitehead*, 2 Doug. 745; *Bulland* v. *Harrison*, 4 M. & S. 387; Angell on Highways, 2nd ed., p. 445.

In the present case the jury have found that the public had a right to travel upon the road in question. They have also found that the sea had so eaten into it on the east side of the plaintiff's farm that it was impossible to enter on the road without going upon the plaintiff's land, and they have likewise found that the defendant would have had to travel only 200 yards further to reach his destination by going on the new road provided by the Government as a substitute for the old dilapidated one.

Justification for travelling upon adjacent land, when a road is temporarily impassable, may be found in the necessity of the occasion, but when one knows that a highway which he has a right to use is founderous, and when there is another way by which he can reasonably travel, he is not justified in going upon adjoining land. The road in question had been for years in a dilapidated condition. It had been in part so completely washed away for a long period before the occasion to which this suit has reference, that at one point an entrance could not be effected upon it without travelling over the plaintiff's land; the repairing of it had long been discontinued, and the Government had provided as a substitute another public road adjacent to the old one; the travel by which new road would entail upon the defendant the trifling additional distance of 200 yards. All this was known to the defendant, who resided in the locality. In these circumstances it would be absurd to conclude that there was any reasonable necessity for the defendant to haul his loads upon the plaintiff's land, and in doing so, in my opinion, he became a trespasser.

HODGSON and FITZGERALD, JJ., concurred.

Rule *nisi* discharged as to verdict for ten cents. Rule absolute to set aside verdict for $1. No costs.

NORTH-WEST TERRITORIES

In the Supreme Court.

[FULL COURT, 7TH DECEMBER, 1897.

REGINA v. MONAGHAN.

Indian Acts—Summary conviction—Giving and selling liquor—Two offences—Stated case—Judgment on—Subsequent motion to quash conviction—Res judicata—Necessity for certiorari.

The defendant had been charged on an information and convicted under R. S. C. c. 48, s. 94, for that he did *give and sell* to an Indian intoxicating liquor, etc.

At the close of the evidence, the defendant's counsel objected that two offences were charged. After consideration, the magistrates drew up the conviction as above. The defendant thereupon applied for, and obtained, a stated case, under s. 900 of the Criminal Code, which was heard before SCOTT, J., who held that to *give and sell* were not two offences, and affirmed the conviction.

The magistrates having transmitted the conviction and proceedings to the clerk of the Court at Macleod, under s. 801 of the Criminal Code, the defendant applied for, and obtained from a single Judge, a rule *nisi*, returnable before the full Court at Regina, to quash the conviction, on the same grounds as were taken on the stated case, and a direction was given to the clerk at Macleod to transmit the conviction, etc., to the registrar of the Court at Regina, which he did.

Held, per SCOTT and ROULEAU, JJ., that the conviction, etc., were regularly before the Court and could be dealt with, and that a writ of *certiorari* was not necessary, following *Regina* v. *Wehlan*, 9 U. C. R. 396.

Per RICHARDSON and WETMORE, JJ., that the conviction, etc., were not regularly before the Court, and that a writ of *certiorari* to bring them before the Court was necessary, following *Regina* v. *McAllan*, 45 U. C. R. 402, and distinguishing *Regina* v. *Wehlan*.

Per Curiam, that the grounds now taken on which to quash being the same as those taken and disposed of by a single Judge on the stated case, the matter was *res judicata*.

Rule nisi discharged with costs.

Costigan, Q.C., for the defendant.

Muir, Q.C., for the magistrates and the prosecutor.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [11TH JANUARY, 1898.

KERVIN v. CANADIAN COLOURED COTTON MILLS COMPANY.

Master and servant—Negligence—Workman's death—How occasioned—Evidence—Jury—Conjecture.

An appeal by the defendants from the judgment of a Divisional Court, 28 O. R. 78, 16 Occ. N. 374, was dismissed with costs, the members of the Court being divided in opinion.

OSLER, J.A., and FALCONBRIDGE, J., were of opinion, agreeing with the majority in the Divisional Court, that there was evidence from which it might properly be inferred that the accident was caused by the negligence of the defendants.

BURTON, C.J.O., and MACLENNAN, J.A., were of opinion that the evidence was equally consistent with the theory that the deceased's own carelessness caused his death.

McCarthy, Q.C., and *R. A. Pringle*, for the appellants.

Aylesworth, Q.C., for the respondent.

BOYD, C.]

MAIL PRINTING COMPANY v. CLARKSON.

Bankruptcy and insolvency—Right to prove on insolvent estate—R. S. O. 1887 c. 124, s. 20, s.-s. 4—Claim "not accrued due"—Construction of advertising contract.

Where an estate is being administered under the Assignments and Preferences Act, R. S. O. 1887 c. 124, claims depending upon a contingency cannot rank, but only debts strictly so called.

An advertising contract gave the advertiser, in consideration of the sum of $1,000, the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month, and at the expiration of twelve months, whether the space had been used or not, to pay $1,000, less such sums as might have in the meantime been paid. The advertiser, before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to c. 124.

Held, reversing the judgment of BOYD, C., 28 O. R. 326, 17 Occ. N. 143, that the $1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank.

Grant v. *West*, 23 A. R. 533, applied.

D. E. Thomson, Q.C., for the appellant.

C. J. Holman, for the respondents.

DAW v. ACKERILL.

Church—Incumbent's salary—Liability of churchwardens—Voluntary contributions.

The churchwardens of an Anglican congregation which has adopted the free pew system, and in which the only revenue is derived from the voluntary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose.

Judgment of BOYD, C., 28 O. R. 452, 17 Occ. N. 234, affirmed.

Clute, Q.C., for the appellant.

S. Masson, for the respondents.

ROSE, J.]

In re CANADIAN PACIFIC RAILWAY COMPANY AND COUNTY AND TOWNSHIP OF YORK.

Constitutional law—Railways—Highways—Crossings—Maintenance of gates—Apportionment of cost—Railway committee—Railway Act, 1888.

The Railway Committee of the Privy Council, on the application of the city of Toronto, ordered the Canadian Pacific

Railway to put up gates and keep a watchman where the line of railway crossed a highway running from the city of Toronto into the township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in certain proportions by the railway company, the city, the township, and the county.

Held, per BURTON, C.J.O., and MACLENNAN, J.A., that assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county.

Per OSLER, J.A., that the legislation was *intra vires*, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee.

Per MEREDITH, J., that the legislation was *intra vires*, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question.

Per Curiam.—That the decision of the Railway Committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the Court.

In the result the appeal from the judgment of ROSE, J., 27 O. R. 559, 16 Occ. N. 222, was allowed as to the county of York, and dismissed as to the township of York.

Aylesworth, Q.C., for the appellants the township of York.

C. C. Robinson, for the appellants the county of York.

Robinson, Q.C., and *Angus MacMurchy*, for the respondents, the Canadian Pacific Railway Company.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

HESSELBACHER v. BALLANTYNE.

Sale of goods—Executory contract—Possession—Non-payment of price—Loss of goods—Liability.

An appeal by the plaintiff from the Judgment of ROSE, J., 28 O. R. 182, 17 Occ. N. 7, was dismissed with costs, the Court

holding that, on the evidence, the plaintiff had accepted and taken possession of the logs, and not dealing with the point upon which the case turned in the Court below.

Aylesworth, Q.C., for the appellant.

W. M. Douglas, for the respondent.

ROBERTSON, J.]

COLL v. TORONTO R. W. CO.

Master and servant—Damages—Tort—Wrongful act of servant—Scope of employment.

The master is not liable for the wrongful act of the servant, though done during the course of his employment and intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority, and is one which the master himself could not legally do.

The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the car, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger.

Judgment of ROBERTSON, J., reversed.

J. Bicknell, for the appellants.

Aylesworth, Q.C., and *L. V. McBrady*, for the respondent.

LUFFMAN v. LUFFMAN.

Ship — Sale — Unregistered lien—Notice—Merchants Shipping Act, 1894, (Imp.)

While, under s. 57 of the Merchants Shipping Act, 1894, 57 & 58 V. c. 60 (Imp.), unregistered equitable interests can be enforced as between the parties immediately affected, the effect of s. 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests, even though he knows of them.

Judgment of ROBERTSON, J., reversed.

W. Nesbitt, for the appellant.

C. J. Holman, for the respondent.

FALCONBRIDGE, J.] [11TH JANUARY, 1898.

FAWKES v. GRIFFIN.

Receiver—Money in hands of—Payment into Court—Default—Attachment—Order for motion to rescind—Delay—Irregularities—Specific order for payment—Punishment—R. S. O. 1887 c. 67, ss. 6, 11—Understanding between receiver and solicitor—Claim of receiver upon money in his hands.

On the 27th June, 1895, an order was made in this action, by consent, appointing the defendant's solicitor receiver in the action until the 3rd September, 1895, to collect the rents of the premises in question, and directing that he should pass his accounts before the Master and pay into Court the balance which might from time to time be certified to be in his hands. On the 28th August, 1895, the plaintiff's solicitor wrote to the receiver asking that the matter might remain as it was until October. The receiver swore that he thereupon called on the plaintiff's solicitor, and an understanding was arrived at between them by which he was to continue to act as receiver until a motion should be made to dissolve or continue the injunction, and that all moneys which he collected as receiver were to remain in his hands until the disposition of the action, when he undertook to pay them over, and on this understanding he consented to allow the motion to continue the injunction to stand *sine die*. In October, 1895, the receiver passed his accounts, and on the 22nd of that month the Master certified that the sum of $266.64 was in the receiver's hands to be paid into Court as directed by the order. The receiver not having paid the money into Court, the plaintiff's solicitor, on the 12th November, 1895, wrote to him requesting him to do so; and the receiver answered on the same day saying that, according to any orders or reports that had been made, he had not ascertained any date within which the money should have been paid into Court; that he was awaiting a specific order for that purpose, and as soon as such order was made, or at any time, he was prepared to pay into Court the money he had received. On the 27th November, 1895, notice of motion was served by the plaintiff for an order to commit the receiver to gaol for his contempt in not paying into Court the sum found due, and on the 10th December, 1895, no one appearing to oppose the motion, an order was made by BOYD, C., requiring the receiver within ten days to pay the amount into Court, and that in default of his

doing so a writ of attachment should issue, etc., etc. On the 13th January, 1896, notice of motion was given by the receiver, by the special leave of BOYD, C., for an order setting aside the last mentioned order, on the ground of the understanding above mentioned between the receiver and the plaintiff's solicitor, and an explanation of the failure of the former to oppose the motion to commit. The understanding was denied by the plaintiff's solicitor. The receiver also swore that the plaintiff and defendant were both indebted to him in large amounts, and he claimed a lien on the money in his hands for costs, and a right of set-off. Upon this motion an order was made by FALCONBRIDGE, J., on the 31st March, 1896, extending the time for payment into Court by the receiver until the 30th April then next, and directing that in default thereof the motion should be dismissed with costs.

Held, upon appeal, that no sufficient case had been made out for interfering with the orders of BOYD, C., and FALCONBRIDGE, J.

There was great delay in moving, but it was to be assumed in favour of the receiver that a sufficient order to extend the time for doing so was made, and that Rule 1454 of January, 1896, amending Con. Rule 536, as to rescission of *ex parte* orders, applied, though it did not come into force until after the order of BOYD, C., was made.

Neither in the affidavits filed nor in the notice of motion to rescind the first order were any objections taken to the regularity of the proceedings, and the case was not one in which the Court should be astute to discover them, or permit them to be raised for the first time on the argument of the appeal: *Treherne* v. *Dale*, 27 Ch. D. 366.

That an attachment lies against a receiver as an officer of the Court for his default in compliance with the order to pay into Court the money found to be in his hands sufficiently appears from *In re Wray*, 36 Ch. D. 138, *In re Gent*, 40 Ch. D. 190, and *In re Freston*, 11 Q. B. D. 553, and other cases applied and followed in *Pritchard* v. *Pritchard*, 18 O. R. 173. The powers of the Court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim *inter partes*, but for punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R. S. O. 1887 c. 67 are inapplicable.

It cannot be said that an understanding between the receiver and the solicitor of one of the parties ought to be accepted as an excuse for non-compliance with the order, more especially when the authority to waive the order is not admitted or is denied by the parties or either of them. And while there may be cases such as *In re Gent*, 40 Ch. D. 190, where the Court, in case of the receiver, has relieved him from paying in the whole of a very large sum found to be in his hands, recognizing the fact that he may be entitled to a share thereof and to remuneration, none is to be found where he has been permitted to discharge himself by setting up claims which, had they been put forward in the first instance, would in all probability have prevented his appointment: *Re Bell's Estate*, L. R. 9 Eq. 172.

Besides, the receiver's letter of the 12th November, 1895, furnished a complete answer to his application for relief, showing, as it did, especially when taken in connection with the fact that he was not prepared on the 10th December to set up the grounds now relied on, that these grounds were a mere afterthought.

Semble, that a specific order to pay over the balance is the proper course in the first instence.

Judgment of FALCONBRIDGE, J., affirmed.

W. R. Smyth, for the appellant.

Bradford, for the respondent.

STREET, J.]

CERRI v. ANCIENT ORDER OF FORESTERS.

Life insurance—Benevolent society—Mistake as to age—Misrepresentation—Good faith—52 V. c. 32, s. 6.

Section 6 of the Ontario Insurance Amendment Act, 1889, 52 V. c. 32, does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted as a member and given an endowment certificate, it was held that the beneficiary named therein could not recover.

Judgment of STREET, J., 28 O. R. 111, 16 Occ. N. 379, reversed, MACLENNAN, J.A., dissenting.

Aylesworth, Q.C., and *D. F. McWatt*, for the appellants.

G. G. Mills, for the respondent.

DRAINAGE REFEREE.]

STEPHENS v. TOWNSHIP OF MOORE.

Drainage—Repairs to drain—"Person injuriously affected"—Mandamus—Drainage Act, 1894.

Under s. 73 of the Drainage Act, 1894, 57 V. c. 56, a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and is entitled to a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can show that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property.

Judgment of the Drainage Referee reversed.

M. Wilson, Q.C., for the appellant.

Lister, Q.C., and *Aylesworth*, Q.C., for the respondents.

OFFICIAL ARBITRATOR.]

In re RODEN AND CITY OF TORONTO.

Statutes — Construction — Amendment — Retroactive effect — Limitation of actions—54 V. c. 42, s. 16.

Unless there is a clear declaration in the Act itself to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights.

Section 16 of 54 V. c. 42, limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation, does not apply to a claim existing at the time of the passage of the Act.

Judgment of the city of Toronto official arbitrator affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.

H. M. Mowat, for the respondent.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 25TH OCTOBER, 1897.

PETRIE v. MACHAN.

Division Court — Jurisdiction — Contract—Commission — Fixed amount—Interest.

The defendant by a contract in writing signed by him, directed to the plaintiff, instructed the latter to sell certain saw-mill machinery as follows:—

"Please enter in your descriptive catalogue of machinery for sale the . . . to net me $1,000. I hereby authorize you to sell (setting out terms). I retain to myself the right of selling or of exchanging or of otherwise disposing of said goods in whole or in part without the assistance of (the plaintiff), but agree in such case to pay you ten per cent. commission on the above amount . . . same commission to apply in case of withdrawal of offer."

The defendant gave away the machinery to his brother, who afterwards, without the assistance of the plaintiff, sold it for $350.

Held, that the plaintiff was entitled to recover $100 as commission, but no interest, and that his claim was within the jurisdiction of a Division Court.

Judgment of the 2nd Division Court in the county of Perth reversed.

R. McKay and *G. Grant*, for the plaintiff.

Aylesworth, Q.C., for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., 6TH DECEMBER, 1897.

SAWYER AND MASSEY CO. v. PARKIN.

Mandamus—Division Court—Jurisdiction—Agreement for sale of machine—Ascertainment of amount over $100.

Under a written agreement for the sale of a machine, signed by the defendant, he was to send to the plaintiffs within ten

days after the machine was started, a promissory note, with approved security, for $125, the price thereof; and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by the plaintiffs f. o. b. cars, addressed to the defendant, to an outside railway station, was received by him and shortly after returned to the plaintiffs.

Held, by ROBERTSON, J., in Chambers, that there was no jurisdiction in a Division Court to entertain an action for the price of a machine, as the amount "was not ascertained by the signature of the defendant," within the meaning of R. S. O. 1887 c. 51, s. 70, s.-s. (1) (c), for, in addition to the signature, evidence was necessary to show that the terms of the agreement had been performed by the plaintiffs.

Reversed on appeal, and an order made in the nature of a mandamus to the Judge of the County Court of Dufferin to try the action in the 4th Division Court in that county.

Petrie v. *Machan*, *ante* p. 55, followed.

Kirwan Martin, for the plaintiffs.

No one appeared for the defendant.

[BOYD, C., ROSE, J., FALCONBRIDGE, J., 3RD JANUARY, 1898.

REGINA v. STERNAMAN.

Criminal law — Murder — Poisoning—Design—Evidence—Admissibility — Death of former husband of prisoner.

Upon the trial of the prisoner for the murder of her husband, who was living with and attended by her in his illness, it was proved that his death was due to arsenical poisoning. In order to show that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, and that such symptoms were those of arsenical poisoning.

Held, that the evidence was admissible.

J. R. Cartwright, Q.C., and *Britton Osler*, for the Crown.

W. M. German, for the prisoner.

[Boyd, C., Ferguson, J., Robertson, J., 10th January, 1898.

In re LUCKHARDT.

Dower—Mortgaged lands—Purchase of equity of redemption—Discharge of existing mortgage—New mortgage—Registration—Equitable dower—42 V. c. 22—Legal estate—Momentary seisin.

A married man, making a purchase of certain lands, as part of the consideration paid off an existing mortgage and obtained a statutory discharge in favour of his vendor. On the same day the vendor executed a conveyance to him, and he executed a mortgage, in which his wife joined to bar dower, in favour of the vendor, to secure the balance of the purchase money. All three instruments were registered on the same day, the discharge first, the conveyance second, and the mortgage third. The purchaser subsequently made another mortgage, his wife again joining to bar dower, under which the lands were sold.

Held, affirming the judgment of Rose, J., Robertson, J., dissenting, that the dower of the wife of the purchaser did not attach.

Per Ferguson, J.—The right to equitable dower in cases other than those where the equitable estate comes into existence by the husband, being the owner of the land, executing a a mortgage upon it in which the wife joins to bar dower, is unaffected by 42 V. c. 22, and stands as it stood before that Act was passed; and, as, in the present case, the husband was not, at the time of the making of the mortgage, the owner of the land, but there was an outstanding mortgage upon it made by one who was or had been the owner, the case did not fall within the statute, and the appellant was not entitled to the new right spoken of in *Martindale* v. *Clarkson*, 6 A. R. 1.

It was contended that the husband became entitled to the legal estate at the time of the discharge of the mortgage which was in existence when the equity of redemption came into his hands, and when he gave back another mortgage for part of the purchase money; but this contention could not prevail; upon the registration of the discharge the legal estate which the mortgagee executing the discharge had went directly to the purchaser's then existing mortgage, without passing even momentarily through the purchaser.

W. Davidson, for Amelia Luckhardt.

J. C. Haight, for Weicher, a receiver.

[ARMOUR, C.J., STREET, J., 17TH JANUARY, 1898.

BANK OF TORONTO v. QUEBEC FIRE INS. CO.

BANK OF TORONTO v. KEYSTONE FIRE INS. CO. OF ST. JOHN.

Discovery—Examination of officer of company—Assignor of chose in action—Rules 439, 441.

Rule 441 of the Rules of 1897 provides that where an action is brought by an assignee of a chose in action, the assignor may without order be examined for discovery.

Held, that this Rule could not be extended, by reference to Rule 439 or otherwise, to the examination of an officer of a corporation, the assignors of a chose in action.

R. McKay, for the plaintiffs.

L. G. McCarthy for the defendants.

JOHNSTON v. GALBRAITH.

Division Court—Appeal from—Issue as to satisfaction of judgment—Prohibition—Chambers.

An appeal by the plaintiff from an order of the Judge of the County Court of Halton dismissing an application by the plaintiff for a new trial on a question or issue tried by the Judge, upon oral evidence, in Division Court Chambers, as to the satisfaction of a judgment recovered by the plaintiff in the 2nd Division Court in that county. The plaintiff moved, in the alternative, for prohibition.

Held, that the appeal did not lie, and the application for prohibition should be made in Chambers.

R. S. Appelbe, for the plaintiff.

D. O. Cameron, for the defendant.

ALEXANDER v. IRONDALE, BANCROFT, AND OTTAWA R. W. CO.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

Held, reversing the decision of ROSE, J., *ante* 24, that in

this case the subpœna for the examination of the defendants' president, as an officer of a corporation, for discovery, should not be set aside *quoad* the books and documents which it called upon him to produce, for the affidavits showed that the accounts of the defendants were kept in the books of the president; and the practice of setting aside a subpœna, as laid down in *Steele* v. *Savory*, [1891] W. N. 195, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner.

A. C. McMaster, for the plaintiff.

W. H. Blake, for the defendants.

In re RIBBLE v. ALDWELL.

Mechanics' liens—Enforcement—Forum—County Court Judge.

All actions and proceedings to enforce mechanics' liens must be brought and taken in the High Court of Justice under the procedure enacted by 59 V. c. 35, as amended by 60 V. c. 24. Although by ss. 31 and 32 of the former Act a County Court Judge has complete jurisdiction in such an action or proceeding, if in the High Court, yet, if the proceedings are intituled in a County Court, he has no jurisdiction.

R. S. Appelbe, for the plaintiffs.

G. C. Campbell, for the defendants.

[19TH JANUARY, 1898.

In re LOTT v. CAMERON.

Prohibition—Division Court—Amount in dispute—Unsettled account—Apparent want of jurisdiction—Part prohibition.

Decision of MEREDITH, C.J., *ante* 20, affirmed upon appeal.

C. J. Holman, for the defendant.

J. H. Moss, for the plaintiffs.

[28TH JANUARY, 1898.

FOLEY v. TOWNSHIP OF EAST FLAMBOROUGH.

Municipal corporations—Highway—Accident—Runaway horses—Control—"Repair" of highway.

An appeal by the plaintiffs, the widow and child of a man named Foley who was killed by being thrown from a waggon on the Centre road in the township of East Flamborough, from the judgment of BOYD, C., at Hamilton, dismissing with costs an action brought against the township corporation for damages for the death, which the plaintiffs charged was due to the road being out of repair, there being an obstruction in it in the shape of a stump. Foley was being driven by a friend of his, one Sullivan, in the latter's waggon, to which was attached a pair of spirited horses. The action was dismissed because it was found that Sullivan was drunk, and Foley, if sober, must have known it, and this condition contributed to the accident.

The trial Judge not having found specifically whether the road was or was not in a reasonable state of repair, the Court now found, upon the evidence, that at the time of the accident the road was in a reasonable state of repair, having regard to the requirement of the public using it in the ordinary way.

The word "repair," as used in the Municipal Act, is a relative term. If the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, *i.e.*, horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

But for *Sherwood* v. *Hamilton*, 37 U. C. R. 410, it should be held that in this case the running away of the horses and their ceasing to be under control was the proximate cause of the injury.

Assuming the facts to be that the driver, in spite of ordinary care on his part, lost control of his horses, and that, they running away, the injury was caused by their running the vehicle against the stump in the highway, the plaintiffs could not recover, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel.

The appeal was dismissed with costs.

Lynch-Staunton, for the plaintiffs.

W. T. Evans, for the defendants.

[29TH JANUARY, 1898.

FITZGERALD v. MOLSONS BANK.

Municipal corporations—Borrowing powers—Current expenditure—Inquiry by lenders—Repayment of money lent—Action to restrain.

An appeal by the plaintiffs from the judgment of ROSE, J., at the trial at Ottawa, dismissing the action, which was brought by certain ratepayers of the village of Hintonbrugh against the bank, the village corporation, and the sheriff of the county of Carleton, to restrain the collection and enforcement of a judgment for $6,000 recovered by the bank against the village corporation, upon the ground that the corporation had no power to borrow from the bank the money for which judgment was recovered.

The borrowing of $1,000 from the bank was authorized by by-law of the village corporation passed in 1895. The amount borrowed was expended in the repair and alteration of certain roads and in diverting the course of a certain stream within the village limits. These works were within the general powers of the corporation, but no provision had been made for the outlay in the estimates. The by-laws authorized the borrowing of not more than $7,000 to meet current expenditure until the taxes could be collected. The by-law which authorized the levying of the rates for 1895 specified the amounts to be levied for each separate purpose, and these works were not specified. The whole amount authorized to be levied was only $5,179.45.

In 1897, after this action had been begun, a by-law was approved by the vote of the ratepayers and passed which authorized the issue of debentures for $8,000, reciting the expenditure upon the words referred to.

Held, that, upon the proper construction of s. 418 of the Municipal Act of 1892, as amended by the Act of 1893, s. 10, a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet the then current expenditure, and cannot lawfully lend more than that sum,

although not bound to inquire into the existence of an alleged necessity for borrowing.

It was admitted, however, that the money borrowed from the bank was expended by the council upon works within its jurisdiction upon which money lawfully obtained for the purposes of the council might lawfully have been expended; the by-law of 1897 was also admitted, and that the council had issued debentures and raised money upon them, and were willing to pay back to the bank the money borrowed, and were only restrained from doing so by the proceedings in this action.

If the plaintiffs, upon the passing of this by-law, had withdrawn their opposition to the payment of the bank's claim, they would have been entitled to their costs, because they were right up to that point; but they insisted that the council had no right to use the money raised upon these debentures in repaying the bank, because the by-law did not specifically state that the money was to be paid to the bank. There is nothing in the Municipal Act which prevents a council, with the approval of the ratepayers, from raising money for the repayment of such a debt as this. A municipality, having so borrowed money and expended it for the benefit of the ratepayers, is not to be restrained from being honest enough to pay it back.

Appeal dismissed with costs.

J. E. O'Meara, for the plaintiffs.

Aylesworth, Q.C., for the defendants the Molsons Bank.

W. R. Smyth, for the defendant Sweetland, the sheriff.

[Boyd, C., 1st November, 1897.

PALMER v. MAIL PRINTING CO.

Landlord and tenant—Lease—Agreement as to vacancy—Condition—Breach—Avoidance of lease by lessor—Execution—Company—Corporate seal.

In a lease was a provision that "in case the said premises . . . become and remain vacant and unoccupied for the period of ten days . . . without the written consent of the lessors, this lease shall cease and be void, and the term hereby created expire and be at an end . . . and the proportionate part of the current rent shall thereupon become immediately

due and payable, and the lessor may re-enter and take possession . . ."

Held, that the term did not cease by the lessee going out and leaving the premises vacant for ten days, but that the agreement embodied in the lease was a subsequent condition, a breach of which could only avoid the lease at the instance of the lessors.

Semble, that a lease by a corporation is validly executed if the corporate seal is affixed by the proper custodian.

Ryckman and *C. W. Kerr*, for the plaintiff.

J. B. Clarke, Q.C., and *Swabey*, for the defendants.

[4TH JANUARY, 1898.

BRERETON v. CANADIAN PACIFIC R. W. CO.

Action—Jurisdiction of Ontario Courts—Injury to land in another Province—Local or transitory action.

The plaintiff complained that the defendants, by negligent use or management of their line of railway, allowed fire to spread from their right of way to the plaintiff's premises, whereby his house and furniture were burnt. These premises were alleged to be in the Province of Manitoba, where the plaintiff himself resided, and in which the defendants were legally domiciled and actually carried on business. The defendants denied the plaintiff's title to the land upon which the house and furniture were situate.

Held, that the action, as regards the house, was in trespass on the case for injury to land through negligence, and this form of action was, like trespass to land, local, and not transitory, in its nature. The action, therefore, so far as the house was concerned, could not be entertained by the Ontario Court; but *aliter* as to the furniture.

Companhia de Mocambique v. *British South Africa Co.*, [1892] 2 Q. B. 258, [1893] A. C. 602, followed.

Campbell v. *McGregor*, 29 N. B. Reps. 644, not followed.

Shepley, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendants.

[FERGUSON, J., 13TH DECEMBER, 1897.

NEIL v. ALMOND.

Execution—Fi. fa. lands—Lien—Money charged upon land—Proceeding under R. S. O. 1887, c. 111, s. 23—Limitation of actions—Renewal of writ.

The right of an execution creditor under a *fi. fa.* lands is a "lien;" the money mentioned in it is money "charged upon lands;" taking steps to sell under it is a "proceeding" under s. 23 of R. S. O. 1887, c. 111; and such proceeding under a *fi. fa.* more than ten years old, even although renewed from year to year, will be enjoined.

W. H. P. Clement, for the plaintiff.

W. H. Blake, for the defendant Almond.

R. B. Beaumont, for the defendants the Canada Permanent L. & S. Co.

[ROSE, J., 5TH JANUARY, 1898.

GOLD MEDAL FURNITURE MFG. CO. v. LUMBERS.

Landlord and tenant—Agreement for termination of tenancy—"Disposing of" demised premises—Notice to quit—False representation—Covenant for quiet enjoyment—Disturbance—Breach—Acquiescence—Damages.

The plaintiffs were lessees of the defendant of part of a factory, under a lease made in pursuance of the Act respecting short forms of leases, which contained a proviso that in the event of the defendant disposing of the factory, the lessees should vacate the premises, if necessary, on notice or payment of a bonus. Shortly after the lease was made, the defendant notified the plaintiffs that he had disposed of his interest in the factory premises, and they would be required to vacate the portion occupied by them. The plaintiffs vacated the premises, under protest, and brought this action for damages for fraudulent representations.

By an agreement made between the defendant and G., it was recited that the parties "desire so to manage and deal with the said lands and premises as to cause the same to return an income greater than the expenditure now required to be made;" and it was provided that G. was to have superintendence of the

building and of obtaining tenants at rentals greater than the rentals then being received; that the defendant was to advance money to make improvements; that whatever G. did was to be done for and in the name of the defendant, who was to collect all the rents and returns; the leases to be in the defendant's name, and the tenants to be his tenants. Then there was a provision for a sub-lease of the premises to G. upon the happening of certain events, at a named rent, and for an option for purchase by G. at a fixed price at any time before the expiration of the sub-lease.

Held, that the defendant had not by this agreement disposed of the factory, within the meaning of the proviso in the plaintiffs' lease; but, as the defendant had not intentionally, wilfully, or maliciously misled the plaintiffs, and was acting in good faith upon what he believed to be his rights, there was no false and fraudulent representation to the plaintiff.

Derry v. *Peek*, 14 App. Cas. 337, followed.

Held, however, that the plaintiff was entitled to succeed for a breach of the covenant for quiet enjoyment of the premises "without interruption or *disturbance* from the lessor;" for where the lessor covenants against his own acts, it is not material whether the act assigned as a breach was lawful or unlawful; and the acts here done were in breach of the covenant, for the defendant had no right to give the plaintiffs notice to quit, and no right to complain that the plaintiffs acted upon the notice without waiting for an action to be brought.

Edge v. *Boileau*, 16 Q. B. D. 117, followed.

Cowling v. *Dickson*, 45 U. C. R. 94, 5 A. R. 549, discussed.

It was urged that an agreement made after the notice to quit, under which the plaintiffs vacated the premises before the day named in the notice, was an acquiescence in the defendant's demand.

Held, not so; the plaintiff went out under protest, and going out earlier merely lessened the damages.

The damages to be assessed upon the same principle as in the case of an eviction.

S. H. Blake, Q.C., and *F. C. Cooke*, for the plaintiffs.

Watson, Q.C., and *S. C. Smoke*, for the defendant.

[STREET, J., 6TH JANUARY, 1898.

WARREN v. VAN NORMAN.

Way—Right of—Prescription—Termini—Slight deviations—Interruptions.

The evidence showed that the plaintiff and his predecessors in title had for upwards of twenty years before the commencement of the action used and enjoyed as of right a way over the defendant's land from the plaintiff's land to a highway. The *termini a quo* and *ad quem* had not varied during the twenty years; but at two points, about fourteen years before action, one of the plaintiff's predecessors slightly altered the line of the way for the purpose of going round muddy spots, and the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way.

Held, that they did not operate to do away with the plaintiff's right to claim the way between the termini, that way having been substantially used during the whole period; and the plaintiff was entitled to have his right to the way between the termini declared, but should be confined either to the original or substituted line.

Wimbledon, etc., Conservators v. *Dixon*, 1 Ch. D. 362; Gale on Easements, 6th ed., p. 327; *Rouse* v. *Bardin*, 1 H. Bl. 351; and *Payne* v. *Shedden*, 1 M. & R. 382, referred to.

Slight interruptions by the defendant were insufficient to prevent the statute from running.

Carr v. *Foster*, 3 Q. B. 581, and *Flight* v. *Thomas*, 11 A. & E. 688, referred to.

J. A. Hutcheson and *A. A. Fisher*, for the plaintiff.

Britton, Q.C., and *W. B. Carroll*, for the defendant.

IN CHAMBERS.

[BOYD, C., 13TH JANUARY, 1898.

HUYCK v. WILSON.

Arbitration and award—Action to enforce award—Publication—Meaning of—Time for moving against award—Interest—Costs of arbitration—Taxation—Judgment—Writ of summons—Special indorsement.

An appeal by the plaintiff from an order of the local Judge

at Picton setting aside his own *ex parte* order allowing the plaintiff to enter judgment upon a writ of summons specially indorsed, in default of appearance, and setting aside the judgment entered pursuant thereto and execution issued upon such judgment. The action was upon an award.

Held, that publication of an award has one meaning when it relates to the time within which the parties can move against the award, and that was considered in *Redick* v. *Skelton*, 18 O. R. 100, but another meaning when it relates to the completion of the award so far as the arbitrator is concerned, in which case it is satisfied by the execution of the award in the presence of a witness or by any other act showing the final mind of the arbitrator, upon which he becomes *functus officio*: *Brown* v. *Vawser*, 4 East 584; *Brooke* v. *Mitchell*, 6 M. & W. 473.

The indorsement of the writ of summons in this case stated that the award was made and published, and it must be taken to be final as far as the arbitrator is concerned. The award being thus completed, an action may be brought upon it forthwith, though it may be open for the defendant, if dissatisfied, to move against it within the usual limits of time allowed by the practice after publication to the parties. The two proceedings, to set aside the award and to enforce it by action, may go on concurrently. The weight of authority is against any suspension of the right to enforce the award pending the period within which it may be summarily moved against.

Moore v. *Buckner*, 28 Gr. 606, is not in accord with the other cases: see Redman on Awards, 2nd ed., p. 284, and cases there cited; *Doe* v. *Amey*, 8 M. & W. 565; *Plummer* v. *Mitchell*, 48 Me. 184.

In this case there was no objection to the amount awarded except as to the amounts claimed for interest and costs. Interest would not run if no notice of the award was given to the defendant; and the costs of the arbitration did not form a liquidated sum, as they were not taxed. But as to $660, the sum awarded, and $40, the amount paid to the arbitrators, the judgment should stand under Rule 575.

Order below modified by allowing the judgment and execution to stand for $700 and letting the defendant in to defend as to the residue, unless the plaintiff abandon it.

This order to be without prejudice to any motion by the defendant against the award.

J. H. Moss, for the plaintiff.

Swabey, for the defendant.

[MEREDITH, C.J., 25TH JANUARY, 1898.

In re BEATTIE v. HOLMES.

Prohibition — Division Court — Assignments and preferences—Action by assignee for creditors to recover money paid to a creditor—R. S. O. 1897 c. 147, s. 10—Satisfaction of judgment—Motion for prohibition.

Motion by the defendant for an order prohibiting the plaintiff from further proceeding with a plaint in the 3rd Division Court in the county of Huron.

The claim of the plaintiff was to recover $13.39, and the particulars stated that it was made by the plaintiff "as assignee of the estate of John Hanna, of Seaforth, an insolvent debtor, for repayment by the defendant, Joseph G. Holmes, of Goderich township, of the sum of $13.39, being the amount paid to him out of the proceeds of butter transferred on the 4th day of August, 1894, by the said John Hanna, said transfer and payment being an unjust preference, and void as against the plaintiff as such assignee as aforesaid, having been made within sixty days of the assignment for the benefit of creditors of the said John Hanna."

It appeared that Hanna, being in insolvent circumstances, transferred 11,000 lbs. of butter to D. D. Wilson in trust for certain of the former's creditors called "the Holmesville patrons," of whom the defendant was one, and that the defendant had received out of the proceeds of the sale of the butter, as his share under the transfer to Wilson, the sum sued for, and that the moneys which Wilson distributed among the Holmesville patrons were so distributed after the assignment to the plaintiff.

The Judge presiding in the Division Court held that he had jurisdiction, and determined that the transfer of the butter was a fraudulent preference within the meaning of R. S. O. 1897 c. 147. The defendant applied for a new trial, and his application was dismissed. The defendant paid the amount of the

judgment debt and costs to the clerk of the Division Court under protest, and then made this motion.

Held, that the claim was in effect for money received by the defendant to the plaintiff's use, and the jurisdiction of the Division Court was not ousted.

In s. 10 of R. S. O. 1897 c. 147 nothing is said about setting aside the transfer, but the right to recover is given to any one who would be entitled to recover the property if it had remained in the possession or control of the debtor.

Held, also, that as the want of jurisdiction did not appear on the face of the proceedings, and the defendant had satisfied the judgment by payment, there was nothing now to prohibit.

Denton v. *Marshall*, 1 H. & C. 654, followed.

In re Johnson v. *Therrien*, 12 P. R. 442, distinguished.

Motion dismissed with costs.

D. L. McCarthy, for the defendant.

Aylesworth, Q.C., for the plaintiff.

[ROSE, J., 30TH DECEMBER, 1897.

BANK OF TORONTO v. INSURANCE COMPANY OF NORTH AMERICA.

Particulars—Application for — Close of pleadings —Affidavit—Necessity—Trial.

After issue joined upon the statement of defence, the plaintiff cannot obtain an order for particulars of the defence without an affidavit showing the necessity for particulars. They cannot be for the purpose of pleading, and there must be evidence that they are required for the purpose of trial.

Smith v. *Boyd*, 17 P. R. 463, followed.

R. McKay, for the plaintiffs.

Ryckman, for the defendants.

[ROBERTSON, J., 27TH DECEMBER, 1897.

In re DOWLER v. DUFFY.

Prohibition—Division Court—Garnishee—Judgment summons—Committal—Examination—Affidavit—R. S. O. c. 51, s. 235—57 V. c. 23, s. 18.

The County Court Judge, presiding in a Division Court, has no power to commit a garnishee for default in making payments pursuant to an order after judgment; and s. 18 of 57 V. c. 23 has not extended his powers in that behalf.

Before a garnishee can be examined under ss. 235 to 248 of R. S. O. 1887 c. 51 as now permitted by s. 18 above, it is necessary that the creditor, his solicitor or agent, should make and file the affidavit required by s. 235.

H. J. Duncan, for the garnishee.

Masten, for the primary creditors.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[JOHNSTON, Co. C. J. AND MASTER, 24TH DECEMBER, 1897.

REGINA v. MACDONALD.

Criminal law—Threat of serious bodily harm—Imprisonment in default of finding sureties to keep the peace—Warrant of commitment—Form—Recitals—Discharge of prisoner.

The defendant was arrested and brought before the stipendiary magistrate for the city of Halifax for threatening the complainant in these words: "By Jesus Christ, I will kill you yet." He was required by the magistrate to find sureties to keep the peace, and, failing to do so, was committed to gaol for three months. The warrant of commitment merely recited that the prisoner threatened the prosecutrix with serious bodily injury by saying the above words, and that he was required to

enter into a recognizance with sureties, which he failed to do, but it did not allege that the prosecutrix feared bodily injury from the defendant from the threat conveyed by the words used, nor that the exhibition of articles by her against him was without malice or ill-will, but merely for the preservation of her person from injury, as required by the form YYY in schedule 1 of the Criminal Code, 1892, although the complaint correctly followed the form WWW.

A writ of *habeas corpus* having been granted, the gaoler returned as the cause of detention the warrant above described, and a motion was made for the defendant's discharge.

Held, that the warrant of commitment was bad for omitting to show on its face that the prosecutrix feared bodily injury from the threat, and that she proceeded against the prisoner without malice or ill-will, etc., etc., these averments being required by the form YYY; and the prisoner must be discharged.

Order made for discharge, with the usual protection to the magistrate, constable, and gaoler.

John J. Power, for the defendant.

W. F. MacCoy, Q.C., for the magistrate and the informant.

[30TH DECEMBER, 1897.

GABRIELS v. WARD.

Arrest—Capias—Defect—City Civil Court—Omission to show territorial jurisdiction.

The defendant was arrested on a capias issued out of the City Civil Court for the city of Halifax, at the suit of the plaintiff, for a debt, and was imprisoned in the county gaol to answer at the trial the amount claimed. The capias did not show on its face the place of issue other than by the word "Halifax" in the margin, and by the words "in and for the city of Halifax" after the signature of the clerk.

Held, on the return of a *habeas corpus*, that the capias was bad for not showing on its face that it was issued within the city of Halifax, and the defendant must be discharged.

Spain v. *Manning*, 28 N. S. Reps. 439, followed.

John J. Power, for the defendant.

W. R. M. Hartlen, for the plaintiff.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 30TH NOVEMBER, 1897.

FOSTER v. MUNICIPALITY OF LANSDOWNE.

Demurrer—Hearing of, before trial—Order for—Rules 162, 280, 335, 426, 440—Practice.

The defendants by their statement of defence, besides answering the facts alleged in the statement of claim, demurred thereto. The demurrer was set down for hearing before a single Judge sitting on a Wednesday, and after argument an order was made overruling it.

On appeal from this order to the full Court the plaintiff's counsel objected that the demurrer could only be argued at the trial of the action, no order having been obtained for the setting down and hearing of it before a single Judge on a Wednesday.

The plaintiff's counsel referred to the old practice, by which an order to plead and demur was necessary. Rules 162, 280, 335, 426, and 440 of the Queen's Bench Act, 1895, were also referred to and discussed.

Held, that the appeal should be heard. There seemed some confusion from the wording of the Rules and the reference to demurrers in Rule 426. The best mode of construing the rules so as to avoid difficulty would seem to be to hold that where a defendant by his statement of defence answers facts set out in a statement of claim, and at the same time demurs thereto, as under Rule 280 he may do, *prima facie* the demurrer and question of law thereby raised should be argued at the trial of the action. But the defendant might apply under Rule 440 to a Judge for an order to have the question of law decided before evidence was given, or any question or issue of fact is tried.

If the Judge thinks such a course expedient, he may make an order accordingly, and then on production of that order the prothonotary can, under Rule 162, set down the demurrer for argument in the proper list.

In the present case the appeal should be heard. To give effect to the objection that the demurrer was improperly set down and argued, and the defendant should be left to raise the question of law at the trial, would not do justice between the parties here, because a judgment disallowing the demurrer had been entered, and so the defendants could not now argue it at the trial.

The argument of the appeal should therefore be proceeded with.

Metcalfe and *E. E. Sharpe*, for the plaintiff.

Cameron, A.-G., and *James*, for the defendants.

[DUBUC, J., 20TH JANUARY, 1898.

CURRIE v. RAPID CITY FARMERS' ELEVATOR CO.

Execution—Conditional purchase of land—Order for payment of purchase money—Issue of execution—Possession—Waiver.

This was an application by the plaintiff under Rules 685 and 691 of the Queen's Bench Act, 1895, for an order to issue execution against David Milne to levy $2,700.

On the 18th September, 1896, a sale was held, under the decree of the Court, of the lands and buildings in question in this suit, but there was no bid, and the sale was abortive. On the same day Milne made an offer in writing as follows: "I hereby offer you $2,700 cash for a clear deed of the Rapid City Farmers' Elevator, plant and all machinery belonging to the same, also all lands in connection with same." This was addressed to the plaintiff's solicitors. Milne was told that the title would be perfected in two weeks; in the meantime he took possession, and made some alterations in the premises. He asked for the title several times, and each time was told that it would be ready in a few days. In May, 1897, Milne was notified that the title was ready, and he made arrangements to pay the amount agreed upon, but was advised by his solicitor that the title was not yet completed. On the 30th August Milne caused a notice to be served on the plaintiff's solicitors that unless title was made to him within two weeks from that date, they might consider his offer withdrawn.

On the 14th September the plaintiff's solicitors wrote Milne's solicitors that the order confirming his offer had been approved and would be signed immediately on the return of the Master, after vacation.

Two weeks after the notice of the 30th August Milne gave up possession of the property and returned the key.

The Master's report was dated the 18th September.

On the 27th September the plaintiff obtained from TAYLOR, C.J., an *ex parte* order dispensing with payment into Court of the purchase money due by Milne, and directing that the payment be made to the Imperial Loan Company within ten days after service of a copy of the order and upon his receiving a conveyance of the land.

Notice of this application was served on the 22nd November.

Held, that Milne was bound to obey the order made by TAYLOR, C.J., by paying the purchase money to the Imperial Loan Company or into Court, and unless he did so within two weeks from the service on him of this order, the plaintiff should be allowed to issue execution; but there should be no costs of the application.

The proper course for Milne would have been to apply to rescind or set aside the order already made. While that order stood, it must be obeyed; *Vansittart* v. *James*, 1 Cooper, *temp.* Cottenham, 379; *Hide* v. *Hide*, *ib.* 379; *Chuck* v. *Cremer*, *ib.* 339; *Wilding* v. *Andrews*, *ib.* 380.

A point was raised by the plaintiff that Milne, by going into possession and making alterations in the buildings, had waived his right to question the title.

Held, that his offer was a conditional one. As the sale was not completed until certified and reported by the Master as accepted on the 18th September, Milne must be held to have gone into possession under his conditional offer, which called for a clear deed, and that he should not be deemed to have waived his right to ask for a good title.

Clark, for the plaintiff.

Hough, Q.C., for the defendant.

[BAIN, J., 25TH JANUARY, 1898.

In re LONDON AND ONTARIO INVESTMENT CO. AND McKITTRICK.

Landlord and tenant—Overholding Tenants Act, R. S. M. c. 112—Colour of right.

Application under the Overholding Tenants Act, R. S. M. c. 112. The original landlord, from whom McKittrick rented the property, having mortgaged the premises to the company, and having made default, the company took possession under their mortgage. In pursuance of the requirements of the license commissioners, certain improvements were made on the premises, used for hotel purposes; otherwise a license would not have been granted. The company, having gone to this expense, raised McKittrick's rent from $75 to $100 a month, which he refused to pay. He was then served with a month's notice to quit, and, as he still retained possession, the present proceedings were instituted. McKittrick contended he held the premises as a yearly tenant and was entitled to six months' notice to quit.

Held, that the tenant was holding the premises in the *bona fide* belief that he had a right to hold them, and, having regard to the terms of the lease under which the tenant held up to the time the company took possession, and to what subsequently took place between him and the company's agent, it was fairly open to question if the implication did not arise that it was understood by both parties that the tenancy should be continued, at least until the end of the year for which the tenant was applying for a license. It could not therefore be said that the tenant was holding without colour of right, and as the Act did not authorize a Judge to inquire and decide whether the right which the tenant asserted was well founded or not, the application must be dismissed with costs: *Price* v. *Guinane*, 16 O. R. 264; *Magann* v. *Bonner*, 28 O. R. 87.

Phippen, for the landlords.

Bonnar, for the tenant.

BRITISH COLUMBIA.

In the Supreme Court.

IN CHAMBERS.

[Bole, Local J., 27th December, 1897.

ELSON v. CANADIAN PACIFIC R. W. CO.

Discovery—Production of documents—Order for—When granted—Examination of party—Order for—Affidavit.

An application by the defendants, upon summons, for an order requiring the plaintiff to file an affidavit of documents, and for an order to examine the plaintiff *viva voce* before the trial. No affidavits were filed. The action was brought by the administrator of the estate of a deceased person who was killed in a railway accident to recover damages for his death.

Held, that while the party applying under Rule 283, B. C., for an affidavit of documents is not required to file an affidavit, it does not follow that the order is granted as a matter of course, but the Court must ascertain from the proceedings the questions to be tried, and be satisfied that some good can be reasonably expected from making the order. And, as in this case, from the nature of the action, it was unlikely in the extreme that there were any documents to produce, and it was not suggested that any were in existence, the discovery sought should be refused.

Re Wills Trade-Mark, [1892] 3 Ch. 207, followed.

2. Under Rule 708, B. C., partly copied from Ontario Rule 492, an application to examine an adverse party should be supported by affidavit.

Summons discharged with costs to the plaintiff in any event.

Exchequer Court of Canada.

[BURBIDGE, J., 29TH NOVEMBER, 1897.

WOODBURN v. THE QUEEN.

Contract—Statutory requirements—Informality—Ratification by Crown by order in council.

A contract entered into by an officer of the Crown empowered by statute to make a contract in a prescribed way, although defective in respect of the statutory requirements, may be ratified by the Crown.

R. V. Sinclair, for the suppliant.

W. D. Hogg, Q.C., for the Crown.

[DAVIDSON, J., 16TH NOVEMBER, 1897.

REGINA v. OGILVIE.

Crown—Contract—Conflict of laws—Appropriation of payments—Receipt—Error—Rectification.

The doctrine that where a contract is made in one Province in Canada, and is to be performed either wholly or in part in another, then the proper law of the contract, especially as to the mode of its performance, is the law of the Province where the performance is to take place, may be invoked against the Crown as a party to a contract.

2. While both the English law and the law of the Province of Quebec give to the debtor owing several debts the option of appropriating any payment he may make to any particular one of such debts, provided he exercise his option at the time of such payment, yet under the Quebec law, where the debtor does not exercise such option, and thus gives a right to the creditor to appropriate the payment, the creditor must exercise his option immediately upon payment being made, and cannot delay exercising it up to the time of trial, as he may do under the doctrine of the modern English cases.

3. Where a person owing several debts has accepted a receipt from his creditor by which a specific imputation is made, he may afterwards have the payment applied upon a different debt by showing that he had allowed the former imputation to be made through error, unless the creditor has been thereby induced to give up some special security.

Fitzpatrick, Q.C., S.-G., *Greenshields*, Q.C., and *E. L. Newcombe*, Q.C., for the Crown.

J. S. Hall, Q.C., and *W. D. Hogg*, Q.C., for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[MACLENNAN, J.A., 11TH FEBRUARY, 1898.

In re TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

Appeal—Drainage Act, 57 V. c. 56, s. 106—Rules applicable to High Court appeals—Time—Vacation—Motion to confirm proceedings—Costs.

The Rules applicable to appeals from the High Court to the Court of Appeal are to be applied, as far as possible, to appeals from the reports of the Drainage Referee under the Drainage Act, 57 V. c. 56; and the Christmas vacation is to be excluded in the computation of the month within which, by s. 106 of that Act, such an appeal is to be made.

Where the respondents' solicitor, by letter, insisted that the appeal was not regularly or properly brought, the appellants were justified in making a motion to extend the time for taking certain steps or to confirm the proceedings taken, and were entitled to the costs of such motion, although it was, strictly speaking, unnecessary, because the proceedings were found to be regular.

J. H. Moss, for the appellants.

F. D. Armour, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

[Armour, C.J., Falconbridge, J., Street, J., 31st January, 1898.

REGINA v. PENNOCK.

Criminal law—Neglect of husband to support wife—Criminal Code, s. 210, s.-s. 2—Conviction—Evidence.

Crown case reserved by the police magistrate for the city of Toronto. The defendant was tried before the magistrate on the 30th April, 1896, at the city of Toronto, upon the information of his wife, Laura Pennock, charging him under the Criminal Code, s. 210, s.-s. 2, for that he in the month of April, 1896, at the city of Toronto, did neglect and refuse to support Laura Pennock. The defendant and his wife were married in October, 1894. Upon the trial the wife alleged that the defendant neglected to supply her with necessary and sufficient food and clothing, in consequence of which she left him of her own accord, caused by neglect of support, on the 9th April, 1896, and on the same day laid the information. There was a conflict of testimony as to whether or not she had sufficient support, but the magistrate found as a fact that she had not, and that the defendant was able, and without lawful excuse neglected, to provide necessaries. The magistrate was satisfied that the husband was treating her most cruelly and furnishing her with barely sufficient poor food to maintain life, but not to retain her health or that of her child, milk not being provided, and with the apparent object of forcing her to leave, he getting his own meals elsewhere. It appeared, however, that when she left him she took $5.15 of his money, and further that her relatives were supplying her with necessaries, as she was practically starving and destitute; also that she had earned $6 in one week during a former separation, when living with her parents. Counsel for the defendant contended that, although the magistrate might be satisfied that the evidence justified a decree for alimony or an order for a weekly allowance under 51 V. c. 23, the evidence was not sufficient to support a conviction under the Criminal Code. The magistrate convicted the defendant, but reserved the question whether the prosecution could be sustained under the Code.

The Court affirmed the conviction.

J. R. Cartwright, Q.C., for the Crown.

DuVernet, for the prisoner.

[ARMOUR, C.J., STREET, J., 31ST JANUARY, 1899.

In re ARMSTRONG—ARMSTRONG v. ARMSTRONG.

Security for costs—Plaintiff out of jurisdiction—Property within jurisdiction—Administration order—Consent to charge share with costs—Place of reference.

A plaintiff residing out of the jurisdiction, but owning a substantial amount of property within it, should not be ordered to give security for costs.

And where the plaintiff was applying summarily for an administration order, and it appeared that he had an interest worth $273 in the estate in respect of which he applied, he was absolved from giving security for costs, although his residence was out of the jurisdiction, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs which he might be lawfully ordered to pay in the course of the administration proceedings.

The testator lived and died in the county of S., the defendant executor lived there; and one of the two parcels of land which made up the real estate of the testator was in that county. The other and smaller parcel of land was in the county of Y., and the plaintiff's solicitors practised there.

Held, that the reference should be to the Master at the county town of S.

Gallagher, for the plaintiff.

Aylesworth, Q.C., and *A. E. Scanlon*, for the defendant.

[10TH FEBRUARY, 1898.

GIGNAC v. ILER.

Bankruptcy and insolvency—Conveyance by insolvent debtor—Preference—Impeaching—Pressure—Time — Consideration — Untrue statement in conveyance—Proof of other consideration—Burden of proof—Statute of Elizabeth.

An appeal by the plaintiff from the judgment of MEREDITH, J., dismissing the action, which was brought against the sheriff of the county of Essex and his bondsmen, for damages for wrongful seizure and conversion of a crop alleged to be the property

of the plaintiff, but seized and sold by the sheriff under an execution against one Antilla, who had conveyed to the plaintiff the land on which the crop grew. The trial Judge held that the crop was not the plaintiff's because the conveyance to him was an unjust preference by an insolvent debtor, and therefore void.

Held, that, as there was evidence of a request, amounting to pressure, on the part of the plaintiff, for the conveyance, to secure him against the liability he was under for Antilla, and the first proceeding taken to impeach the transfer was the actual seizure by the sheriff more than sixty days afterwards, the transfer could not be impeached as a preference.

But the transaction was void under the Statute of Elizabeth. The statement of the consideration was untrue because there was, confessedly, no exchange of properties, as stated in the conveyance. The onus was upon the plaintiff to prove beyond reasonable doubt that there was some other good consideration. The plaintiff contented himself with giving his own unsupported evidence of the existence of a consideration, which contradicted the statement in the deed. Under these circumstances, the evidence of the existence of a consideration was insufficient, and the conveyance must be treated as voluntary.

Appeal dismissed with costs.

F. D. Davis, for the plaintiff.

S. White, for the defendants.

[Boyd, C., Robertson, J., 2nd February, 1898.

PATTERSON v. CENTRAL CANADA L. & S. CO.

Waste—Permissive waste—Tenant for life—Growth of weeds.

An action for permissive waste will not lie against a tenant for life.

Re Cartwright, 41 Ch. D., 532, followed.

The spread of weeds, such as mustard and quack grass, from natural causes or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, and the failure to overcome the growth and spread of the weeds by a

process of summer fallowing or hand-picking, is no evidence of waste, but only of ill-husbandry.

The fact that there is an Ontario statute for the prevention of the spread of noxious weeds, does not make any difference in this respect.

Judgment of STREET, J., 17 Occ. N. 380, affirmed.

N. Ferrar Davidson, for the plaintiff.

D. W. Dumble, for the defendants.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 8TH FEBRUARY, 1898.

REGINA v. HAMMOND.

Criminal law—Evidence voluntarily given at coroner's inquest—Admissibility at subsequent criminal trial—56 V. c. 31, s. 5—Courts of co-ordinate jurisdiction—Decisions of.

Crown case reserved.

The Canada Evidence Act, 1893, 56 V. c. 31, s. 5, enacts: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him. . . . Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Held, MEREDITH, J., *dissentiente*, that this applies to any evidence given by a person under oath, although he may not have claimed privilege.

Regina v. *Williams*, 28 O. R. 583, 17 Occ. N. 376, not followed.

Regina v. *Hendershott*, 26 O. R. 678, approved.

The evidence in this case was given before the coroner, who had told the prisoner that "it was not necessary to be examined under oath unless he wished to be so, and that any evidence taken might be used against him." The prisoner, however, said that he wished to give evidence, and was sworn in the usual way, and gave evidence which was afterwards used to fix criminal liability upon him.

Held, also, that as the Courts of appeal for criminal cases are now constituted, the decision of the Judges of one Court is not binding on the Judges sitting in another Court of the same jurisdiction.

F. F. B. Johnston, Q.C., for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

[Boyd, C., Meredith, J., 9th February, 1898.

In re FORSTER—BATTISBY v. WITHERSPOON.

Costs—Scale of—Cause removed from Surrogate Court—Order of transfer—Terms—Consent judgment—Costs out of the estate.

An order transferring a cause or proceeding from a Surrogate Court into the High Court contained a clause providing that in the event of the defendant, the applicant for the order, failing to establish his defence, his costs, if any were allowed him, should be on the Surrogate Court scale.

By a consent judgment, which recited the pleadings and proceedings, and adjudged that the will which was disputed by the defendant was the last will of the testatrix, and should be admitted to probate, it was also adjudged that the costs of all parties should be paid out of the estate.

Held, upon appeal from taxation, that the defendant was bound by the order of transfer, and his costs should be taxed on the scale of the Surrogate Court.

L. G. McCarthy and *D. L. McCarthy*, for the appellant.

C. J. Holman and *Patullo*, for the respondents.

[10th February, 1898.

VIDEAN v. WESTOVER.

Appeal—Waiver—Acting on judgment—Quashing appeal—Costs.

An appeal from the decision of Ferguson, J., *ante* 85, was quashed, following *International Wrecking Co.* v. *Lobb*, 12 P. R. 207, and *Keith* v. *Keith* 25 Gr. 110, because the defendant was held to have waived his right of appeal by acting upon the

judgment in obtaining his costs out of the funds in Court, pursuant to the judgment, which costs, with the plaintiffs' costs, also paid out, exhausted the fund.

The appeal was quashed without costs, as no motion to quash was made by the respondents.

Tremeear, for the appellant.

C. J. Holman, for the respondents.

In re BEATTIE v. HOLMES.

Prohibition—Division Court—Assignments and preferences—Action by assignee for creditors to recover money paid to a creditor—R. S. O. 1897, c. 147, s. 10—Jurisdiction of Division Court.

An appeal by the defendants from the order of MEREDITH, C.J., *ante* 68, dismissing a motion for prohibition to the 3rd Division Court in the county of Huron. The plaint in the Division Court was by the assignee for creditors of one Hanna to recover $13.39 from the defendant, a creditor of Hanna, to whom it was paid by one Wilson, to whom Hanna had transferred a quantity of butter for the benefit of the defendant and others of his creditors. Wilson sold the butter and distributed the proceeds among the creditors. The butter was sold in September for $1,800, and the proceeds distributed prior to the assignment to the plaintiff for the general benefit of creditors, made under the Assignments Act on the 2nd October. The transfer of the butter to Wilson was within sixty days of the assignment.

Held, affirming the decision of MEREDITH, C.J., that the plaintiff by his action had elected to avoid the transfer as to each of the creditors who had received a part of the proceeds. The transfer was divisible into as many parts as there were creditors. There was no dealing with Wilson except as a conduit through whom the butter might be turned into money and paid over to the beneficiaries. Each creditor might have the means of defending the payment made to him by showing such a state of facts as would rebut the presumption of fraud or preference. There was no common ground of defence by which the transfer as a whole was to be supported, and therefore there was no inquiry before the Division Court as to any matter not

within its competence, for the amount paid to each was within $100. It was not necessary to consider what might be the result if the transfer as a whole had to be set aside.

D. L. McCarthy, for the defendant.

Aylesworth, Q.C., for the plaintiff.

[MEREDITH, C.J., ROSE, J., 14TH FEBRUARY, 1898.

CHRISTY v. ION SPECIALTY CO.

Pleading—Striking out—Disclosing no reasonable answer—Rule 261—Amendment.

An appeal by the plaintiff from an order of BOYD, C., in Chambers, dismissing a motion by the plaintiff under Rule 261 to strike out paragraphs 13 and 14 of the statement of defence in an action to restrain the infringement of a patent for a bicycle saddle, on the ground that they disclosed no reasonable defence and were embarrassing. These paragraphs set up the invalidity of the first claim of the plaintiff's patent, and were, admittedly, an answer to the original statement of claim; but the plaintiff had amended his statement of claim by omitting his assertions based upon the first claim in the patent, and the defendants did not amend their defence.

Bristol, for the plaintiff.

W. Cassels, Q.C., for the defendants, contended that one claim of the patent being bad as a matter of law, the whole patent was bad, subject to the power of the trial Judge, under the Patent Act, to discriminate.

THE COURT held that it was only in a very clear case that a pleading should be struck out as showing no reasonable ground of action or defence, and it could not be said that this was manifestly such a case; and they also doubted whether a defence which was originally good could be struck out after the plaintiff had amended, and whether it was the duty of the defendant to amend.

Appeal dismissed with costs to the defendants in any event.

[ROBERTSON, J., 10TH JANUARY, 1898.

HOEFNER v. CANADIAN ORDER OF CHOSEN FRIENDS.

Life insurance—Benefit society—Certificate—Non-compliance with rules as to initiation.

Action on a relief fund certificate for $1,000 issued by the defendants, who were incorporated under R. S. O. 1887, c. 167, on the life of one Hoefner, deceased, in favour of the plaintiff. The deceased was balloted for and elected at a meeting of a subordinate council of the defendants, but died before being duly initiated according to the rules of the Order, before a duly constituted court of the council, though an irregular initiation had taken place before the chief councillor and the prelate of the Order, and the subordinate council falsely recorded in their minutes that the deceased had been initiated at a certain meeting.

Held, that the defendants were not bound by the irregular acts of the subordinate council, which could not, nor could its officers, waive the requirements of the society's laws in respect to the relief fund, and, as the deceased had not been properly initiated, the plaintiff could not recover.

Teetzel, Q.C., and *McClemont*, for the plaintiff.

Aylesworth, Q.C., and *Lyman Lee*, for the defendants.

[STREET, J., 1ST FEBRUARY, 1898.

MILLER v. BATTY.

Limitation of actions—Ejectment—Tenancy at will—Commencement of statutory period.

An action of ejectment and to recover rent and mesne profits. The defendant entered into possession in July, 1886, upon a promise from his father, the true owner, to give him the land, and had remained in possession ever since, without disturbance, and without payment of rent, or anything in the nature of rent, and without any acknowledgment of his father's title. This action was begun on the 19th May, 1897, by the executors and devisees under the will of the father.

Held, that the defendant's position from July, 1886, when he entered upon his possession, was that of a tenant at will to his father, and, for the purposes of the statute, that tenancy must be taken to have continued until July, 1887. During that period the statute did not begin to run in his favour. This action was, therefore, brought before the defendant's possession had ripened into a title, and the plaintiffs must have judgment for possession of the land with costs of the action.

Keffer v. *Keffer*, 27 C. P. 257, referred to.

J. Armstrong, for the plaintiffs.

J. M. Kilbourn, for the defendant.

IN CHAMBERS.

[Boyd, C., 11th January, 1898.

LAFRANCE v. LAFRANCE.

Alimony*—*Interim allowance—Consent judgment in former action—Payment—Separation deed—Change of circumstances.

In 1897 a wife brought an action against her husband for alimony and to set aside a judgment pronounced by consent in a former action for alimony begun in 1884, under which the wife had received $200. The defendant pleaded the judgment as a bar, and also adultery by the wife, and a deed of separation. The plaintiff disputed the deed of separation, and impeached the judgment as obtained by fraud and without her knowledge or consent; the payment of $200 she attributed to a release of dower given by her. She also alleged expulsion and desertion by her husband, and that he had been living in adultery after the judgment.

Held, that, under the circumstances, the plaintiff was entitled to an order for interim alimony.

Atwood v. *Atwood*, 15 P. R. 425, distinguished.

Henderson v. *Henderson*, 19 Gr. 464, followed.

Morrall v. *Morrall*, 6 P. D. 98, and *Williams* v. *Baily*, L. R. 2 Eq. 731, also referred to.

W. B. Taylor, for the plaintiff.

H. W. Church, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, JANUARY, 1898.

REGINA v. HALIFAX ELECTRIC TRAMWAY CO.

Constitutional law—Lord's Day Act—Amendments—Provincial legislature —Ultra vires—Criminal law—B. N. A. Act, ss. 91, 92.

Chapter 159 of R. S. N. S., 3rd ser., passed before Confederation, dealt with offences against religion. The provisions of that chapter were repealed by the Parliament of Canada in 1869, with the exception of three sections relating to desecration of the Lord's day. In 1889, 1890, and 1891, the legislature of Nova Scotia passed Acts in amendment of c. 159, and upon an information being laid before the stipendiary magistrate for the city of Halifax against the defendant company for violation of c. 159, as so amended, the defendant company applied to the Supreme Court *in banco* for a writ of prohibition.

The majority of the Court were of opinion that the amendments to c. 159 were beyond the powers of the provincial legislature.

Per RITCHIE, J.—In the R. S. N. S., 3rd ser., c. 159 is placed with the other criminal statutes then in force. Being part of the criminal law, the provincial legislature had no power to alter or amend any of its sections.

Per GRAHAM, E.J.—The first question is whether the amendments relate to a subject coming within "property and civil rights" under s. 92 or "the criminal law" under s. 91 of the British North America Act. Are they aimed at a public wrong, or are they prohibitions with respect to civil rights? Blackstone, in vol. 4, treats Sunday not only as a civil institution, but also from the standpoint of religion and morals. In Bishop on Criminal Law, vol. 2, s. 951, it is suggested that a violation of the Lord's day was indictable at common law. In Chitty's Criminal Law, vol. 1, p. 20, there is a form of indictment, but that proceeds on the ground of nuisance. The

Criminal Code of Canada deals with offences against religion, morals, and public convenience. There is a dictum in *Russell* v. *The Queen*, 7 App. Cas. 829, that the Parliament of Canada can declare that certain uses of property and certain acts in relation to property are criminal and wrongful. These laws are for the order and good government of Canada. In *Regina* v. *Wason*, 17 A. R. 221, the provincial statute which was upheld did not purport to punish a crime in the interests of public morality. These amendments to c. 159 deal with matters which the legislature regarded as injurious to the public. It is not a matter of a merely local or private nature. It professes to amend the criminal law, which the federal parliament alone can do.

TOWNSHEND, J., concurred.

MCDONALD, C.J., dissented.

Writ of prohibition granted without costs.

W. H. Covert and *H. Mellish*, for the defendants.

Borden, Q.C., and *J. A. Chisholm*, for the informant.

[5TH FEBRUARY, 1898.

BANQUE D'HOCHELAGA v. MARITIME RAILWAY NEWS CO.

Order of Court—Rescission of—Accidental omission—Mislaid affidavit —Order 28, Rule 11.

An appeal from the order of a Judge in Chambers allowing service of a writ of summons on a member of a dissolved partnership as good service on all the partners, the plaintiffs having no knowledge of the dissolution. On the appeal a fresh affidavit was read to show knowledge of dissolution on the part of the plaintiffs, and an affidavit in reply was read on behalf of the plaintiffs, contradicting such new affidavit. When the full Court took the matter under consideration the last mentioned affidavit was mislaid, or overlooked, and no effect given to it; judgment was pronounced allowing the appeal on the ground that the plaintiffs had knowledge of the dissolution, and an order allowing the appeal was issued. Subsequently the error was discovered, and the plaintiffs moved to rescind the order allowing the appeal.

C. H. Cahan, for the plaintiffs, cited Order 28, Rule 11.

Ritchie, Q.C., for the defendants, relied on *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141.

eld, that an order should be made rescinding the order allowing the appeal.

[See *Cousins* v. *Cronk*, 17 P. R. 348.]

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 31ST JANUARY, 1898.

ABELL v. CRAIG.

County Court appeal—R. S. M. c. 33—59 V. c. 3, s. 317—Motion to strike out appeal—Non-compliance with statutory requirements—Excuse—Leave to proceed—Terms—Payment of costs.

Motion under Rule 168 (*b*) of the Queen's Bench Act, 1895, to strike out a County Court appeal entered for hearing before the full Court. It was objected, *inter alia*, that the appellants did not file in the County Court, within ten days after the judgment appealed from was made, an affidavit stating the *bona fide* intention of the appellants to appeal, as required by 59 V. c. 3, s. 317, and no such affidavit of intention to appeal was filed in the County Court until early in January, 1898, while the judgment appealed from was given on the 19th October, 1897.

The action was tried on the 11th October, and judgment reserved. By the statute the Judge had to announce his decision and notify the same to the clerk of the Court within sixty days from the hearing, and it was the duty of the clerk, within twenty-four hours after receiving notice from the Judge, to notify the parties of such decision. The sixty days having passed, and the appellants' solicitor having received no notification of a judgment, he, on the 20th December, wrote to the clerk inquiring as to the condition of the suit. On the 1st January

the clerk wrote a letter, received by the solicitor on the 3rd January, saying that judgment had been given for the defendant, but not saying when it had been given; he also stated that on the 28th December judgment had been entered for the defendant. When the clerk was notified did not appear, but there was no doubt judgment was given on the 19th October, and in all probability he had notice of it on that day, or shortly after. Not only did he not give the appellants' solicitor notice of the judgment, but, six or seven days after receiving from him a letter of inquiry, he allowed the defendant to enter judgment, and did not reply to the solicitor's letter for four days longer. The clerk's letter having been received on the 3rd January, an affidavit of intention to appeal was mailed on the 4th, which would reach the clerk on the 5th January. All the subsequent proceedings were regular.

The appellants were in no way responsible for the delay or irregularity. But the defendant was also blameless; his present motion was made in good faith, and in ignorance of the facts which the appellants showed as ground for indulgence.

Held, that upon payment of the costs of the motion within forty-eight hours after taxation, the appellants should be at liberty to proceed with their appeal.

Mather, for the plaintiffs.

Pitblado, for the defendant.

In re DUNN.

Assessment and taxes—Sale of land for taxes—Expropriation of land before expiry of period of redemption—Who entitled to expropriation money.

An application for payment out of Court of the amount paid in by the Provincial Government on taking, under the Expropriation Act, R. S. M. c. 56, lot 480 of parish lot 66, Portage la Prairie. In June, 1893, Robert Dunn bought the lot at a tax sale for $3, of which $1.42, the amount then due for taxes and costs, was paid, leaving, in the event of the lot not being redeemed, $1.58 to be paid within two months after the expiration of the time allowed for redeeming. Before the time allowed for redemption had expired, the Government took the

lot under the provisions of the Expropriation Act, and paid into Court $10.50 as the value of it. Dunn, claiming to be entitled to the money in Court, because the original owner did not redeem, applied to have it paid out to him.

Held, that the application must be refused.

The exact date at which the lot was taken by the Government did not appear, but it was within two years after the tax sale in June, 1893. At that time Dunn had no title to the lot, nor right to possession; he had a lien on it for $1.42, the amount paid at the tax sale, and interest. Had the original owner paid, within two years after the tax sale, the amount Dunn paid at the time of the sale and interest, he would have been entitled to the money in Court. Because he did not so redeem Dunn claimed the money. There was no evidence that Dunn ever paid the balance of $1.58, and under s. 168 of the Assessment Act, R. S. M. c. 101, he had forfeited all claim to the land, and the same ceased to be affected by the sale, as if it had been duly redeemed. Dunn could have no greater claim to the money than he would have had to the lot, and he was not entitled to it.

D. W. McKerchar, for the applicant.

[BAIN, J., 31ST JANUARY, 1898.

KELLY v. CITY OF WINNIPEG.

Municipal corporations—Corporation works—Resolution of council fixing rate of wages—Intra vires—Bona fides—Injunction.

Application by the plaintiff for an interlocutory injunction. In June, 1895, a resolution was adopted by the council of the city of Winnipeg as follows:—"That in future a clause be inserted in all contracts passed through or let by the council, to the effect that contractors on city works should not pay their labourers or other employees a less rate of wages than seventeen and a half cents per hour; and that rate shall be the minimum rate of wages for all labouring men to be employed on said contracts or on any new construction works undertaken to be done by the city by the day."

The plaintiff was a contractor and ratepayer, and sued on behalf of himself and all other ratepayers. He submitted that

an injunction should issue restraining the city corporation from continuing to act on the resolution or to pay men on new works any greater rate of wages than necessary to obtain suitable men, and to restrain the city from inserting in any contracts any limitation on the minimum amount of wages to be paid by contractors doing work for the city.

Held, that the application must be dismissed, reserving the question of costs until the hearing.

The resolution related to an expenditure of money that was clearly within the authority of the council to make, and the expenditure was not in itself illegal or *ultra vires*.

Where, as in the case here, a governing body is acting within the scope of its powers, and must of necessity exercise a discretion in carrying these powers into effect, the Court should presume, until the contrary is shown, both that the governing body is the best judge of what is for the public benefit and that it has exercised its discretion honestly and reasonably. In such a matter as deciding on the rate of wages to be paid to men employed on the city works the mayor and council should be peculiarly the best judges, and a very clear case of unreasonableness would have to be made out before the Court would be justified in interfering with their decision. The city could hire labourers for less than seventeen and a half cents an hour, but there were many other considerations besides that of mere cheapness that might legitimately influence the council. Upon the wisdom or unwisdom of the policy of the council, acting *bona fide* in a matter within the scope of its powers, it is for the ratepayers and not the Court to pronounce. The resolution was passed in 1895, and had been acted upon by three councils; no request or petition had ever been made to the council for its repeal; and there had been no agitation or expression of opinion on the part of the ratepayers against it. These were circumstances that did not conclude the question raised by the plaintiff's action, but they might incline a Judge to hesitate to exercise the summary jurisdiction of the Court pending the trial of the action. The council, if it carried out the provisions of the resolution, would be acting in a matter that was within the scope of its authority; and, acting *bona fide*, the Court would not be justified in interfering before the plaintiff had established his right at the hearing of the action.

Tupper, Q.C., and *Phippen*, for the plaintiff.

Ewart, Q.C., and *Isaac Campbell*, Q.C., for the defendants.

BRITISH COLUMBIA

In the Supreme Court.

IN CHAMBERS.

[Bole, Lo. J., 24th January, 1898.

In re ATANASSE.

Infant—Custody—Habeas corpus—Age—Consent—Evidence—Welfare of child.

An application by Mary James, an Indian woman, on the return of a *habeas corpus*, for an order for the delivery to the applicant of her illegitimate child, Ellen Atanasse, an infant, who was in the custody of Jane Redner, the matron of the Fort Simpson Methodist Indian School.

The *habeas corpus* was granted on affidavits made by the applicant and Apostle Atanasse, the infant's putative father, and the production of a letter written by the girl herself, complaining of ill-treatment and duress, and asking to be taken away from the school, which was a charitable institution for Indian and half-breed children, where the girl's putative father, with the consent of her mother, had placed her some ten years before.

G. E. Corbould, Q.C., for the applicant.

R. W. Harris, for Jane Redner.

Bole, Lo. J.—When handing over the child to the Reverend Mr. Crosby, principal of the school, it is alleged—but this is positively denied by Mr. Crosby—that there was some stipulation made as to the child being educated as a Roman Catholic, her father and mother being members of that church. Be that as it may, the girl has since her admission to the school been continuously educated in the Methodist catechism, and now declares herself an adherent of that church; and, bearing in mind the surrounding circumstances and the entire omission of any reference to the alleged stipulation with regard to the religious education of the girl in the affidavits of the mother and

Atanasse, and the explanation given by the latter in reply to a question put by the Court, *i.e.*, that he forgot it, I am afraid the allegations now made by both on this subject, for the first time, are due to erring memory and a misconception of the facts.

The girl herself positively swears that she is over sixteen years of age—a statement confirmed by her appearance and family history—and even on Atanasse's own showing she is nearly sixteen. From the evidence before me I am satisfied, and I find as a fact, that she is above that age.

In order to remove any possible influence the respondent might have over the girl, she was, by consent, examined before me in the presence of both counsel, the registrar, and stenographer, excluding all other persons, and she satisfied me beyond reasonable doubt that she voluntarily made the affidavit filed herein, and wished to return to the school, and did not wish to be, but, on the contrary, was strongly opposed to being, turned over to the care of her putative father and his wife, as she alleged that, while with them on a former occasion, they both beat and otherwise ill-treated her.

She also satisfied me that there was no justification or good grounds for her letter wherein she made charges of cruelty against Mrs. Redner, which she knew were untrue, but that the letter was recklessly written when the writer was in a fit of ill-temper, at a time when she was undergoing punishment for deliberate disobedience of reasonable orders.

And, even if the girl were not more than fifteen in August, 1897, as contended for by her mother, I think that if I compelled her to leave the school, where she is happy and well treated, and handed her over to her mother, to be by her handed over to her putative father and his wife till August, 1898, when I have no doubt she would, if in her power, gladly return to the school, I should not be acting for the true welfare of the girl, in the large sense in which the term was used by Lindley, L.J., in *Re McGrath*, [1893] 1 Ch. 143, quoted with approval in *Regina* v. *Gyngall*, [1893] 2 Q. B. 232.

But it is not necessary to decide it on that view of the case alone, for, as I find the girl is above the age of sixteen, and therefore capable of consenting or not consenting, and is consenting to the place where she is, then the very ground for a *habeas corpus* falls away: *In re Agar-Ellis*, 24 Ch. D. 317.

I therefore think the application must be dismissed.

[28TH JANUARY, 1898.

LANG v. CITY OF VICTORIA.

Judgment—Delay in issuing—Right of unsuccessful party to issue—Appeal—Effect of judgment pronounced but not issued.

Summons obtained by the defendants calling upon the plaintiff to show cause why the district registrar of the Court at Vancouver should not proceed to draw up or settle the minutes of the order for judgment for the plaintiff, upon the findings of the jury, pronounced by MCCOLL, J., on the 6th November, 1897, upon cross-motions for judgment upon such findings made by the plaintiff and defendants, and why the plaintiff should not forthwith enter in the office of the district registrar and issue and perfect the order, or why, in default thereof, the defendants should not be at liberty to enter, issue, and perfect the order for judgment for the plaintiff.

BOLE, Lo. J.—The British Columbia Rule No. 361 seems to contemplate that the successful party may, after trial, move to enter judgment, and apparently makes no provision for a situation such as seems to have arisen in the present case. The plaintiff has the conduct of his own cause, and, when he fails to take a step in the action in the manner and within the time limited by the Rules, has to suffer a penalty for his failure. But, if the plaintiff declines to proceed to perfect the judgment obtained by him, is there any process to compel him to do so? No authority has been cited to me showing that the plaintiff is bound to settle the order for his judgment, or that, in case he does not do so, the defendants can obtain the same. It is true that the plaintiff originally took out an appointment to settle the judgment before the registrar, but it appears that on the return day only the defendants' solicitor appeared, and, as the registrar was not then asked either to settle the minutes of the order or to adjourn the appointment, this summons is now before me.

I certainly feel that the case is one of some hardship for the defendants, as the matter is one that they naturally desire to have concluded one way or another; but it may be that the Court of Appeal will be able to see some way out of the difficulty, possessing, as they do, greater powers of dealing with such a matter than can be exercised by a single Judge.

[*Taylor* v. *Nesfield*, 24 L. J. N. S. Q. B. 126, discussed.]

I am inclined to think that this summons is unnecessary. The Rule providing that the time for appeal is to be calculated from the time the order for judgment is drawn up is framed on the ground that until the order is drawn up the appellant cannot be quite sure what he is appealing from; but it must be remembered that as soon as a final judgment is given, that judgment is good, independent of being drawn up; it is an effective judgment from the day it is drawn up: *per* LORD ESHER, M.R., in *Holtby* v. *Hodgson*, 24 Q. B. D. at p. 107; *vide*, also, *In re Risca Coal Co.*, 31 L. J. N. S. Ch. 429; *Salaman* v. *Warner*, [1891] 1 Q. B. 734.

Application dismissed; costs in the cause.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[SCOTT J., 15TH JANUARY, 1898.

PACIFIC INVESTMENT CO. v. SWANN.

Equitable execution — Injunction — Simple contract creditor — Execution before judgment — Discretion — Dissolving injunction—Appeal — Preserving rights of parties.

Motion by the defendant to dissolve an injunction granted by ROULEAU, J., on the *ex parte* application of the plaintiffs, restraining the defendants from taking from the receivers appointed in an action of *Barter* v. *Swann* any property, money, cheque, or security for money, and restraining the receivers from transferring or paying or giving any such property, etc., to the defendant, until after the trial of the action or until further order.

The action was upon a foreign judgment for $12,000 recovered against the defendants by the plaintiffs, and also on the original cause of action, a money claim for calls upon stock. There were several defences.

The only assets of the defendant were those in the hands of the receivers, whose duty it was under the decree in *Barter* v. *Swann* to realize certain property and securities and divide the proceeds equally between the defendant and another.

By the affidavits filed on behalf of the plaintiffs it was alleged that the receivers were about to sell and dispose of the assets in their hands for the purpose of immediately paying over his share to the defendant to enable him to defraud his creditors.

Muir, Q.C., for the defendant. The injunction should be dissolved. The plaintiffs cannot have equitable execution before judgment.

McCaul, Q.C., for the plaintiffs. In these Territories a simple contract creditor has a right to garnish moneys prior to judgment: Judicature Ordinance, s. 386: or to attach personal property where the debtor has attempted to sell or dispose of it with intent to defraud his creditors generally or the plaintiff in particular: *ib.*, s. 394. The equitable principle underlying the doctrine of equitable execution should be extended to enable the plaintiffs to reach property which could be reached before judgment if it was money in the hands of a third person or other property in the hands of the defendant.

Muir, in reply. Provisions for garnishment and attachment before judgment are purely statutory remedies. To extend them would be legislation by the Court.

McCaul. As the point is a new one, if the injunction is dissolved, provision should be made to enable the plaintiffs to appeal, and to hold their injunction pending the appeal upon such terms as may be proper.

Some of the other arguments are mentioned in the judgment.

Scott, J.—If the plaintiffs had recovered judgment against the defendant in this action, I think it will be conceded that they would be entitled to this injunction, but there does not appear to be any authority which goes the length of holding that they are entitled to any such remedy before judgment.

What the plaintiff obtains in effect by this injunction is that the defendant's interest in the proceeds of the property in the hands of the receivers is bound until such time as there

shall be moneys in the hands of the receivers which can be attached, or until the plaintiffs obtain judgment and are thereby placed in a position to apply for a receiver of the defendant's interest in the proceeds.

I think it will be conceded that he is not entitled to an injunction to attain the first object alone.

Then, is he entitled to it to attain the second object? I think not.

In my view, the right of a creditor to have a receiver appointed by way of equitable execution is something distinct and apart from his right to attach debts due to the debtor. They are different modes of execution. It is true that the former remedy appears to have arisen from the fact that the debtor may be entitled to a fund or property which cannot be reached by ordinary execution, but they are distinct remedies.

[Reference to Article in 9 C. L. T., p. 176; Snow's Annual Practice, 1895, p. 924; *Wills* v. *Luff*, 38 Ch. D. 200; *Re Shephard*, 43 Ch. D. 131].

I think a reasonable deduction from the authorities is that equitable execution is a means of enabling the judgment creditor to realize upon the property of the debtor which cannot be reached by the ordinary modes of execution. The attachment of debts is one of those ordinary modes of execution, and the extension of that remedy does not, in my view, imply the extension of any other remedy. If it implied the extension of the remedy of equitable execution, I see no reason why it should not also imply the like extension of the ordinary remedy of execution against lands or goods.

It was also contended that my brother Rouleau having exercised discretion in granting the injunction, I should not interfere with his exercise of it. I admit that the contention is sound if the granting of the injunction was a matter within his discretion, but I do not think it was. Although s.-s. 8 of s. 25 of the Judicature Ordinance provides that an injunction may be granted in all cases in which it shall appear to the Court to be just and convenient, yet it was held in *Harris* v. *Beauchamp*, [1894] 1 Q. B. 801, that those words do not refer to an arbitrary or unfettered discretion of the Court, and do not authorize the Court to invent new modes of enforcing payment in substitution

for the ordinary modes. In my opinion, the granting of the injunction was not within the discretion of my brother Rouleau.

It was also contended on behalf of the plaintiffs that the Court would not permit its officers, viz., the receivers, to deal with the defendant's property in a way that the defendant himself would be prevented from dealing with it, viz., by attachment under s. 894 of the Ordinance. I think a reasonable answer to that contention would be that the injunction does not in any way prevent them from dealing with the property. All that it seems to prevent is the payment over to him of his share of the proceeds, and that could not be prevented by attachment under s. 394. Even if it were conceded that the plaintiffs were entitled to the injunction granted, I think it could not reasonably be contended that they are entitled to an injunction restraining the receivers from selling the property. That would interfere with Mrs. Barter's rights under the decree in *Barter* v. *Swann*.

For the reasons I have stated, I am of the opinion that the injunction should be dissolved, and, being of that opinion, it is unnecessary for me to dispose of the other objections raised by the defendant. He is entitled to the costs of this application.

As the question involved is an important one, the plaintiffs may desire to appeal from the order dissolving the injunction. Should they do so, the parties may not be in the same position when the appeal is disposed of as they are now. If it is eventually found that the defendant is now entitled to receive and dispose of his interest under the decree, he should not be deprived of that right until such time as he may lose it; on the other hand, if it is found that he is not so entitled, his being permitted to receive or dispose of it would be an injury to the plaintiffs. It was suggested on the argument that I might by my order provide against both of these contingencies, but, upon considering the matter, I cannot devise any order which will leave the parties in the same relative position upon the determination of the appeal as they are now.

Supreme Court of Canada.

ONTARIO.] [10TH NOVEMBER, 1897.

TOWNSHIP OF SOMBRA v. TOWNSHIP OF CHATHAM.

Municipal corporations—Drainage—Assessment—Extra cost of works—R. S. O. 1877 c. 174—46 V. c. 18—By-law—Repairs—Misapplication of funds—Negligence—Damages—Re-assessment—Inter-municipa works.

Where a sum amply sufficient to complete drainage works, as designed and authorized by the by-law for the complete construction of the drain, has been paid to the municipality which undertook the works, to be applied toward their construction, and is applied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards, by another by-law, levy or cause to be levied from the contributors of the fund so paid, any further sum to replace the amount so misapplied or wasted.

Judgment of the Court of Appeal reversed.

Aylesworth, Q.C., for the appellants.

M. Wilson, Q.C., for the respondents.

In re FERGUSON—BENNETT v. COATSWORTH.

Will—Construction—"My own right heirs"—Limited testamentary power of devisee—Conditional limitations.

Under a devise to the testator's "own right heirs," the beneficiaries would be those who would have taken in the case of an intestacy, unless a contrary intention appeared; and where a devise was to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention, and the daughter inherited as the right heir of the testator.

Judgment of the Court of Appeal, 24 A. R. 61, 17 Occ. N. 44, affirmed.

McCarthy, Q.C., *J. W. McCullough*, and *Lobb*, for the appellants.

W. Mortimer Clark, Q.C., and *O. R. Macklem*, for the respondents Bennett and others.

F. E. Hodgins, for the respondents the executors.

QUEBEC.] [9TH DECEMBER, 1897.

POWELL v. WATTERS.

Deed—Acquiescence by first purchaser in subsequent deed by his vendor—Evidence—Nullity—Possession—Registry laws—Deed defective in form—Commencement of proof in writing—Secondary evidence—Warranty of title—Impeachment by grantee of warrantor—Litigious rights—Purchase of.

Where the registered owner of lands is present at but takes no part in the execution of a deed, subsequently made by the representative of his vendor, granting the same lands to a third person, the mere fact of his being present raises no presumption of acquiescence or ratification thereof.

The conveyance by an heir-at-law of real estate which has already been granted by his father during his lifetime is an absolute nullity, and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands and whose title is registered.

Writings under private seal which have been signed by the parties, but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.

The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given.

Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession and holds by force, he cannot, when sued, set up against the plaintiff a defence based upon a purchase of litigious rights.

Judgment of the Court of Review, Q. R. 12 S. C. 350, affirmed.

Geoffrion, Q.C., for the appellant.

Lafleur and *Aylen*, for the respondent.

LEFEUNTEUN v. BEAUDOIN.

Appeal—Reversal on questions of fact—Evidence—Affirmative testimony—Interested witnesses—Evidence of reputation.

The Supreme Court of Canada will take questions of fact into consideration on appeal, and if it clearly appears that there has been error in the admission or appreciation of evidence by the Courts below, their decisions may be reversed or varied.

North British and Mercantile Ins. Co. v. *Tourville*, 25 S. C. R. 177, followed.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness, who swears positively to a fact, should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail over the testimony of strangers who are disinterested witnesses.

Evidence by *commune renommée* is unsatisfactory, and should not generally be admitted.

Judgment of the Court below reversed.

Belcourt and *Beaubien*, for the appellant.

Lajoie and *Lussier*, for the respondent.

DELORME v. CUSSON.

Appeal—Jurisdiction—Title to land—Petitory action—Encroachment—Improvements under mistake of title—Good faith—Common error—Demolition of works—Right of accession—Indemnity—Res judicata—Boundaries.

An action to revendicate a strip of land, upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and

consent of the owner of the adjoining lots erected valuable buildings upon his own property, and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In such a case, the judgment, in an action *en bornage*, previously rendered between the same parties, cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions are different.

An owner of land need not have the division lines between his property and contiguous lots of land established by regular *bornage* before commencing to build thereon, when there is an existing line of separation which has been recognized as the boundary.

Judgment of the Court of Queen's Bench, Q. R. 6 Q. B. 202, reversed, and judgment of the Superior Court, Q. R. 10 S. C. 329, restored.

Geoffrion, Q.C., for the appellant.

Fortin, for the respondent.

RIOU v. RIOU.

Deed—Construction of—Servitude—Roadway—User.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and, by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway, at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased

over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action *negatoire* to prohibit further use of the way :—

Held, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance ; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands, so far as might be necessary to give access to each of the owners to the road so purchased, from the nearest practicable point of their respective lands, across intervening properties of the others, for the purpose of the cultivation of their lands beyond the mountain.

Judgment of the Court below affirmed.

Langelier, Q.C., and *Choquette*, for the appellant.

Pelletier, Q.C., and *Riou*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 7TH FEBRUARY, 1898.

REILLY v. McILMURRAY.

Lien—Trainer's lien on race-horse—Use by owner—Right of continuing possession—Loss of lien by parting with possession—Resumption of possession—Revivor of lien.

In an action of replevin for a mare, in which the defendant set up a lien for training it for races, it was shown that the owner had on one occasion, at least, apparently as of right, gone to the defendant's stable, harnessed, and driven it away, and returned it when he was done with it, and, according to the weight of the evidence, taken it on other occasions ; and after the death of the owner, the defendant had, under the instructions of the solicitor for the plaintiff, the administratrix

of his estate, taken it to a sale stable, and left it there a week for the purpose of selling it, and when he got it back undertook to keep it upon payment of a certain sum per month.

Held, that, on the evidence, there was not such right of continuing possession as would give the defendant a lien, as the owner was at liberty to use the mare whenever he desired; and that, even if the defendant had a lien, he had lost it by leaving the mare at the sale stable, when he gave up complete possession, it remaining there at the cost and under the control of the plaintiff; and that the subsequent possession by the defendant did not revive the lien, as such possession was taken under a new and different agreement.

Judgment of the County Court of York reversed.

O'Donohoe, Q.C., for the plaintiff.

A. F. Lobb, for the defendant.

[Boyd, C., Robertson, J., 8th February, 1898.

REGINA v. HUGHES.

Liquor License Act—Keeping liquor for sale—Summary conviction of steward of club—Evidence—Charter of club—Prohibition as to intoxicating liquors.

Motion to make absolute a rule *nisi* to quash the summary conviction of the defendant for unlawfully keeping intoxicating liquors for sale, contrary to s. 50 of the Liquor License Act, R. S. O. 1887 c. 194.

The defendant was the steward of the Wanderers' Bicycle Club, and the evidence showed that the liquor was kept on the club's premises. The club was incorporated under the Joint Stock Companies Act, and every member was a shareholder in the corporation. The liquors were the property of the club, but were dispensed by the defendant, at his discretion, by means of tickets bought from the secretary by members.

Held, that there was sufficient evidence to justify the magistrate's conclusion that the liquors were in the possession of the defendant for the purposes of sale. Though the whole of the building occupied by the club might be under lease to them, their keeping liquors would be a violation of their charter, which

would not be presumed. It might well be supposed that the particular place in the building where the liquors were kept was in the hands of the defendant, who, as appeared, decided in all ordinary cases as to supplying the member on his ticket or not, and who was the occupant of the place for that purpose. The room in question was fitted up like a bar, the defendant was in visible possession, controlling the stock of liquors therein, which were there to be disposed of for an equivalent received by the defendant from those who had the right of entry: ss. 53, 108, 112 of the Liquor License Act.

Ritchie, Q.C., for the defendant.

J. R. Cartwright, Q.C., and *Langton*, Q.C., for the Crown.

[ARMOUR, C.J., FALCONBRIDGE, J., 18TH FEBRUARY, 1898.

SMITH v. BOYD.

Amendment—Pleadings—Trial—Partnership—Conspiracy—Account—Parties—Terms—Costs.

The action as framed was to recover damages for an alleged conspiracy between the defendants, the plaintiff's partner in a mercantile business and another, whereby they fraudulently and secretly withdrew money from the assets of the firm.

The real grievance was the alleged misappropriation by the plaintiff's partner, with the assistance of the other defendant, of partnership funds to the injury of the partnership and of the plaintiff.

At the trial the plaintiff sought to amend by alleging that moneys were received by the other defendant in trust for the firm, and by adding the firm's assignee for the benefit of creditors as a party, and by claiming an account.

Held, that the amendment should have been granted upon proper terms as to costs.

DuVernet, for the plaintiff.

Delamere, Q.C., for the defendant Boyd.

H. S. Osler, for the defendant Cooper.

[Rose, J., 15th February, 1898.

In re DOMINION COLD STORAGE CO.

LOWREY'S CASE.

Execution—Order of Court of another Province—Winding-up Act, R. S. C. c. 129, s. 85—Production of certified copy—Entry.

Execution may be issued under s. 85 of the Winding-up Act, R. S. C. c. 129, upon the order of a Court of another Province, without making such order a rule of Court or obtaining the direction of a Judge, but upon the mere production to the officer of the High Court of a properly certified copy of such order.

Re Companies Act and Hercules Ins. Co., 6 Ir. R. Eq. 207, followed.

Re Hollyford Copper Mining Co., L. R. 5 Ch. 93, and *Re City of Glasgow Bank*, 14 Ch. D. 628, not followed.

In such cases the settled practice of the High Court is to have the order entered in the proper book as a judgment or order.

Masten, for D. Lowrey.

George Bell, for the liquidator of the company.

[MacMahon, J., 3rd February, 1898.

BEAULIEU v. COCHRANE.

Trades unions—Expulsion of member—Fine—Conspiracy—Remedy—Action—Bar—R. S. C. c. 131, s. 4—Libel—Malice—Privilege.

An action by a member of a trade union against certain of his fellow-members for an alleged conspiracy and unlawfully imposing a fine upon him and expelling him from the union, and depriving him of its benefits, and for libel.

There was no evidence warranting a finding that the defendants had entered into a conspiracy to inflict a fine and thus cause the plaintiff's expulsion from the union.

The plaintiff had a monetary interest in the death benefit and sinking funds of the union.

Held, notwithstanding this, and notwithstanding the fact that the imposition of the fine was wholly illegal and unwar-

ranted by the rules of the union, and was virtually an expulsion of the plaintiff, he had no remedy by action; for by the Act respecting trades unions, R. S. C. c. 131, s. 4, the Court is not to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for a breach of any agreement for the application of the funds of a trade union to provide benefits to members; and this action came within these words.

Rigby v. *Connol*, 14 Ch. D. 428, followed.

The alleged offence for which the fine was inflicted was the causing an extra apprentice to be brought into the yard in which the plaintiff and defendants were employed. The defendants, after being told by their employer that the plaintiff had nothing to do with bringing the apprentice in, wrote and caused to be published in their trade journal a statement that the strike ordered by the union when the apprentice was brought in would not have occurred but for the treachery of the plaintiff, who richly deserved the fine imposed.

Held, that there was evidence of malice, and the publication was not therefore privileged.

Belcourt, for the plaintiff.

T. McVeity, for the defendants.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 16TH FEBRUARY, 1898.

KELLY v. CITY OF WINNIPEG.

Municipal corporations—Corporation works—Resolution of council fixing rate of wages—Intra vires—Bona fides—Discretion—Injunction.

An appeal from the decision of BAIN, J., *ante* p. 92, was dismissed with costs, the Court holding that the resolution was

not an illegal one. It was a matter within the discretion of the council, and therefore not one with which the Court could deal.

Tupper, Q.C., and *Phippen*, for the plaintiff.

Ewart, Q.C., and *Isaac Campbell*, Q.C., for the defendants.

BRITISH COLUMBIA

In the County Court.

[Bole, Co.J., 22nd February, 1898.

GILLIS v. CHANNE MINING CO.

Jury—Findings—Question of fact—Terms of contract of hiring—Conflicting evidence—Motion for new trial—Refusal to interfere.

Action for damages for breach of a contract of hiring.

The plaintiff, a working miner, claimed upon the basis of a hiring for six months, or "a winter's work." The defendants averred that the hiring was only from day to day, so long as required by the defendants. Three of the defendants' witnesses admitted that during the conversation when the agreement was made between the parties, the defendants' manager spoke of six weeks being the probable term for which the plaintiff's services would be required. The jury awarded damages as upon a six weeks' contract.

Upon motion by the defendants for a new trial :—

Held, that, as there was conflicting evidence upon a question of fact, as to the terms of the agreement entered into, it being conceded that there was an agreement of hiring, and this question was left to the jury, and there was some evidence to support their finding, the verdict could not be set aside and a new trial ordered, where there was no complaint of misdirection or non-direction, or of the improper admission or rejection of evidence.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 19TH FEBRUARY, 1898.

HOLMES v. BREADY.

Appeal—Taxation of costs in Court of Appeal—Forum for appeal from taxation.

An appeal does not lie to the Court of Appeal or a Judge thereof, but to the High Court or a Judge thereof, to review the taxing officer's taxation of the costs of an appeal to the Court of Appeal from a judgment of the High Court.

There has been no such change in the Act or Rules as to make *Petrie* v. *Guelph Lumber Co.*, 10 P. R. 600, inapplicable, and it is therefore to be followed.

C. A. Moss, for the plaintiff.

G. G. Mills, for the defendant.

[MOSS, J.A., 26TH FEBRUARY, 1898.

PATTERSON v. CENTRAL CANADA L. & S. CO.

Waste—Permissive waste—Tenant for life—Growth of weeds—Leave to appeal—R. S. O. 1897 c. 51, s. 77, s.-s. 4.

An application by the plaintiffs for special leave to appeal to this Court from the order of a Divisional Court, *ante* 81, affirming the judgment of STREET, J., 17 Occ. N. 380, which was mainly in favour of the defendants, in an action by remaindermen against tenants for life for waste.

The plaintiffs made complaint with respect to several matters in which they alleged there had been error, but the most important claims rested upon the contention that a tenant for life is liable to the remainderman for permissive waste.

Held, that the question of fact as to the existence of thistles, mustard, and quack grass at the time of the defendants taking possession must be deemed concluded by the finding of the trial Judge, affirmed by the Divisional Court. And unless, as to them, the law was that the tenant for life was liable for permissive waste, the defendants were not liable for the deterioration they had occasioned. In view of the array of modern authority in favour of the rule that tenant for life is not liable for permissive waste, in the absence of some provision in the instrument creating his estate, expressly imposing the duty to keep in repair, no case had been made out for further litigating these questions in this action. See *Zimmerman* v. *O'Reilly*, 14 Gr. 646, where the question was decided against the remainderman. Eliminating this, the other matters were not sufficient to bring the case within s.-s. 4 of s. 77 of the Judicature Act, R. S. O. 1897 c. 51.

N. F. Davidson, for the plaintiffs.

D. W. Dumble, for the defendants.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 7TH FEBRUARY, 1898.

ARMSTRONG v. HARRISON.

Trusts and trustees—Trust deed—Estate taken by trustees—Beneficiaries—New trustee—Appointment—Injunction.

A., by deed, granted certain land to B., C., and D., trustees, in trust for three temperance societies, and their successors, representatives of the aforesaid, or the representatives of any temperance society, by whatever name . . . known or designated . . . together with all . . . the estate, right, title . . . of him, his heirs and assigns . . . to have and to hold . . . unto the said parties . . . and their successors in trust for said societies. . . ."

Held, that B., C., and D. took only a life estate for their joint lives and the life of the survivor of them, leaving the reversion in fee in the grantor.

Held, also, looking at the situation of the premises and the uses for which they were intended, and having regard to the fact that the temperance societies originally named were all formed in a certain town, that the trust was intended to be confined to temperance societies having the same local habitation.

Held, also, that the plaintiff R., having been appointed a trustee for such a society, although no such appointment could extend or prolong the life estate granted, was entitled to restrain the defendant, his co-trustee, and the sole surviving trustee under the deed, from pulling down a building on the premises

Judgment of the County Court of Halton reversed.

H. S. Osler, for the plaintiffs.

J. Bicknell and *J. W. Elliott*, for the defendant.

[7TH MARCH, 1898.

REGINA v. HOLMES.

Criminal law—Neglect of husband to support wife—Criminal Code, s. 210, s.-s. 2—Denial of marriage—Death of former husband—Evidence—Presumption.

Crown case reserved by the Chairman of the Sessions for the county of York upon an indictment and conviction of the prisoner under s. 210, s.-s. 2, of the Criminal Code, for neglecting to provide necessaries for his wife. The evidence showed that th prisoner was married to the complainant on the 25th June, 1890, but that the latter had been married in July, 1886, to one Wheatley, and the question reserved was whether there was evidence to go to the jury upon which they could find that Wheatley was dead on the 25th June, 1890, and that the complainant was the lawful wife of the prisoner. It appeared that the complainant had heard nothing of Wheatley since a few days after her marriage to him, except the information contained in a letter from an unknown person, which letter had been destroyed before the trial, to the effect that Wheatley was dying at the time the letter was written, which was before the complainant's marriage to the prisoner.

J. M. Godfrey, for the prisoner, contended that this evidence was merely hearsay and was inadmissible, and that there was no presumption of Wheatley's death at the time of the marriage to the prisoner.

J. R. Cartwright, Q.C., for the Crown.

THE COURT held that the jury had the right to find upon the evidence that Wheatley was dead, and, as they had so found, the conviction should be affirmed.

HUNTER v. HUNTER.

County Court appeal—Interpleader order—Finality of—County Courts Act, R. S. O. 1897 c. 55, s. 52 (1)—Construction of.

An appeal by Dwight S. Mason, the claimant of goods seized the sheriff of Victoria, under the plaintiff's execution against by the defendant, from an order made by the Judge of the County Court of Victoria in Chambers, upon an interpleader application made by the sheriff, directing security to be given for the goods and for costs, and the trial of an issue between the execution creditor and the claimant in the event of security being given, but if security not given that the goods should be sold, and the proceeds, less sheriff's costs and charges, paid to the execution creditor.

The appeal was launched under s. 52 (1) of the County Courts Act, R. S. O. 1897 c. 55, which is as follows:—"An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter, from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts, and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory."

Held, that the proviso at the end of the enactment, as to the order being in its nature final, governed the whole section, notwithstanding the punctuation, and that the order appealed against was not in its nature final, but merely interlocutory, and therefore no appeal lay.

George Bell, for the appellant.

C. R. Fitch, for the execution creditor.

H. M. Mowat, for the sheriff.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 26TH FEBRUARY, 1898.

TATE v. NATURAL GAS AND OIL CO. OF ONTARIO.

Parties—Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

The plaintiff, having a claim for arrears of salary and damages for wrongful dismissal, sued the defendant company therefor, alleging an agreement made with the president and certain directors before the company's incorporation, and a subsequent by-law and resolution of the company ratifying the agreement. In consequence of what was alleged in the statement of defence, and after discovery had, the plaintiff applied for leave to amend by adding another company and the president of the defendant company as defendants, fearing that he might not recover against the defendant company, because, although they got the benefit of his services, it might appear that his contract was not with them, but with the other company, or that, from want of authority of those who assumed to act on behalf of one or other of the companies, his contract was in law with the president personally, or the president was liable to him in damages as upon a warranty of authority.

Held, that the plaintiff was entitled, by virtue of Rule 192, to have the question as to which one of the three parties was responsible to him, decided in one action; and, although he had omitted to join two of them originally, an order should be made, under Rule 206 (2), adding these two as defendants at this stage of the proceedings; ROSE, J., dissenting.

Bennetts v. *McIlwraith*, [1896] 2 Q. B. 464, followed.

Aylesworth, Q.C., for the plaintiff.

W. R. Riddell and *A. D. Crooks*, for the defendants and proposed parties.

[3RD MARCH, 1898.

McBRIDE v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Distress—Mortgagor and mortgagee—Decease of mortgagor—Seizure of goods of another on mortgaged premises—Authority of bailiff—Principal and agent—Mortgagee's agent controlling bailiff—Evidence—Admissibility—Letter of solicitor before action.

An appeal by the defendants from the judgment of the Judge of the County Court of Lambton, in favour of the plaintiff for $125 damages, upon the findings of the jury, in an action for trespass and illegal seizure and sale of the plaintiff's goods upon premises mortgaged to the defendants by Mary Ann McBride, the seizure and sale purporting to be under a warrant issued by the defendants to their bailiff to distrain the goods of Mary Ann McBride for arrears due under their mortgage, she having been for some years dead at the time of the seizure, of which the defendants were ignorant. When the defendants found that the goods were those of the plaintiff, they ordered their bailiff to withdraw. The jury, however, found that one Stone was the agent of the defendants, and instructed the seizure and sale after he had been told that the goods were the plaintiff's.

P. D. Crerar, for the defendants, contended that there was no evidence of Stone's agency, and they were not liable for what their bailiff did in seizing the plaintiff's goods under a warrant to seize the goods of the deceased.

Aylesworth, Q.C., or the plaintiff.

Held, that the intention was to seize the goods upon these premises, and the bailiff was acting within the scope of his authority as agent for a principal in making the seizure upon the premises, and the defendants were liable for his act, although the mortgagor was dead and the title in the goods and chattels had passed to another.

Lewis v. *Read*, 13 M. & W. 834, and *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530, referred to.

But, if this view was not tenable, the defendants interfered with the making of the distress, through Stone, who, according to the plaintiff's evidence, was present when the distress was made, accompanied the bailiff when the latter was making the inventory, was told that the deceased mortgagor did not own

the chattels, answered that he did not care, that they were on the place, wrote out the inventory and advertisement, and acted so as to convey the impression to the plaintiff that he was in control and management; and upon this evidence there was a question to submit to the jury as to the authority of Stone to act in directing and controlling the distress. See *Tate* v. *Latham*, [1897] 1 Q. B. at p. 509.

A letter written by the solicitor of the defendants to the solicitor for the plaintiff before action was improperly received in evidence: *Wagstaff* v. *Wilson*, 4 B. & Ad. 339; but this was immaterial, as there was no application for a new trial.

The appeal was dismissed with costs.

WALLS v. SAULT STE. MARIE PAPER AND PULP CO.

Parties—Assignment of debt sued on—Reassignment—Assignment by way of security only—Amendment—Adding assignee as a party.

An appeal by the defendants from the judgment of the Judge of the District Court of Algoma in favour of the plaintiff, upon the findings of the jury, in an action in that Court, brought to recover the balance due to the plaintiff under a contract for getting out wood. The appeal was on the grounds that the plaintiff's claim had been assigned, before action, to one Plummer, and only reassigned at the time of the trial, and the plaintiff was not entitled when the action was begun, and that the amount of the verdict was too large upon the evidence.

Held, that it was not clear that the plaintiff did not retain in himself an interest in the amount coming from the defendants, and that the assignment was not made by way of security, in which case the plaintiff could recover in his own name: *Prittie* v. *Connecticut Fire Ins. Co.*, 23 A. R. 449.

After action and before trial the plaintiff gave security to Plummer for the indebtedness to him, and on the day before the trial Plummer gave the plaintiff a reassignment. Even if the objection could be held to be well taken, this would be a proper case for amendment, adding Plummer as a party: *Dawson* v. *Graham*, 41 U. C. R. 532; *McGuin* v. *Fretts*, 13 O. R. 99

Davis v. *Riley*, [1898] 1 Q. B. 1, distinguished.

Held, also, that upon the evidence the Court could not interfere with the verdict.

W. E. Middleton, for the defendants.

W. M. Douglas, for the plaintiff.

[ROSE, J., 7TH MARCH, 1898.

In re McGILLIVRAY AND CHESTERVILLE PUBLIC SCHOOL BOARD.

Public schools—Dissolution of union school section—Power of arbitrators—59 V. c. 70, ss. 43, 44.

Proceedings having been taken under the provisions of the Public Schools Act, 1896, 59 V. c. 70, for the dissolution of the union school section hereinafter mentioned, arbitrators appointed by the county council under s. 44 of the Act provided by their award that "union school section No. 9 of Winchester township, comprising the incorporated village of Chesterville and rural section No. 8 in said township, be dissolved, and that all the parcels of land included within the boundaries of rural section No. 8 be attached to and form the same for school purposes, and that all the parcels of land included within the boundaries of the village of Chesterville shall remain attached to and form the urban section of Chesterville village for such purpose."

Held, that, though the language was in part insensible, the effect of it was to dissolve the union, recognizing the village as a corporation, subject to the provisions of ss. 53 and 54 of the Act, and school section No. 8 as a non-union school section, subject to the provisions of certain other sections; and that the award was valid as an exercise of power under s.-s. 5 or 6 of s. 43.

Aylesworth, Q.C., for the motion to set aside the award.

Clute, Q.C., and *Hilliard*, contra.

[STREET, J., 3RD MARCH, 1898.

In re CAMPBELL AND VILLAGE OF SOUTHAMPTON.

Municipal corporations—Closing streets—By-law—Notice of intention to pass—Absence of notice as to day on which to be considered—Invalidity of by-law—Motion to quash—Discretion—Acquiescence—Estoppel.

Motion by William D. Campbell for a summary order quashing by-law No. 297 of the village corporation, being a by-law "for the purpose of expropriating and closing up certain portions of the public streets of the village of Southampton," upon the grounds, among others, that the municipal council had no power to pass the by-law without proper notice, and no notice, as required by law, was given of the intention of the council to pass it; that the notice of the intention of the council to pass the by-law, alleged to have been given, did not fix any time for the by-law being considered and for hearing persons opposed to it or whose rights might be affected thereby; that the applicant, who had bought property affected by the by-law, had no notice or knowledge of the day fixed for the passing of the by-law, and had no opportunity of opposing it.

Idington, Q.C., for the applicant.

W. H. Blake, for the village corporation, contended that s. 546 of the Municipal Act, 55 V. c. 42, does not require that a time should be fixed by the published notice; that the failure to fix a time was not fatal to the by-law; and that the applicant had waived or acquiesced in the defect, if any, nine months having elapsed since the by-law was passed, and he having bought his property after notice of the proposed by-law had been given.

Held, that, as it was decided in *Re Birdsall and Township of Asphodel*, 30 U. C. R. 149, that the notice of intention to pass the by-law should state the day on which it is to be considered by the council, the statute is to be read as if it contained a direction to that effect, and the notice here not having so stated, the by-law was invalid; and, under *Re Ostrom and Township of Sidney*, 15 A. R. 372, and *Re Robertson and Township of North Easthope*, 16 A. R. 214, there was no discretion to refuse to quash such a by-law; and, in fact, there was no acquiescence amounting to an estoppel.

Order made quashing the by-law with costs.

IN CHAMBERS.

[STREET, J., 8TH MARCH, 1898.

HOLMES v. BREADY.

Costs—Scale of—Taxation of costs in Court of Appeal—High Court action—Amount of recovery.

An appeal by the plaintiff from the taxation of his costs incurred in the Court of Appeal. The plaintiff recovered judgment in this action for a sum within the jurisdiction of the County Court, and was allowed costs on the County Court scale only, the defendant being allowed to set off the difference between costs on the High Court and County Court scale. The defendant appealed to the Court of Appeal upon the ground that the action should have been dismissed, and the appeal was dismissed with costs. Upon the taxation of these costs, the taxing officer held that they must be taxed as in a County Court action.

By Rule 1180 the costs of all proceedings in the branches of the Supreme Court are in the discretion of the Court or Judge before whom they come for hearing or determination.

Held, that the Court of Appeal having ordered the defendant to pay the costs of the appeal generally, without any limitation as to scale or amount, and there being only one tariff of fees payable upon appeals from the High Court, that tariff must govern the allowance of costs under the order of the Court of Appeal.

Rule 1132 applies only to the costs of the action in the High Court, and not to the costs of an appeal from that Court to the Court of Appeal, which are not within the discretion of a Judge of the High Court.

C. A. Moss, for the plaintiff.

G. G. Mills, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 5TH MARCH, 1898.

CARRUTHERS v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Power of sale—Improvident exercise of—Sale at under value—Damages.

Appeal from the decision of BAIN, J., *ante* 89.

Verdict for plaintiff to stand, but to be reduced by $200; the defendants to pay the costs of the appeal.

CRAYSTON v. MASSEY-HARRIS CO.

County Court—Jurisdiction—Action for recovery of money paid—Estoppel—Equitable claim.

County Court appeal. The plaintiff sued to recover back money paid by him to the defendant company under stress of an alleged seizure by the company's bailiff of the plaintiff's crop, and for damages for trespass to goods.

The plaintiff had given to the company a mortgage of certain cattle and of the crop then standing or thereafter to be grown upon certain lands, to secure payment of a debt due by him to the company. After having made some payments upon this debt, the plaintiff executed another instrument, dated the 5th November, 1894, reciting that he was indebted to the company in the sum of $225.65 upon a certain promissory note; that he was unable to meet the indebtedness; that the company had insisted upon receiving a substituted security, and had agreed thereupon to extend the time for payment; and that the plaintiff had agreed to give that mortgage as a collateral substituted security for payment of the note. By the instrument the

plaintiff granted to the company the crop of grain then on the land, or to be grown within one year from the date of the instrument. There was a proviso for defeasance upon payment of $225.65, with interest at ten per cent. per annum, on the 1st October, 1895, and a covenant for payment of this sum and interest, and that, upon default, the company might enter upon the plaintiff's lands and seize and sell the mortgaged property. The plaintiff made some payments, but in 1897, as he was stacking his crop, the company's bailiff came to seize it for an alleged balance. The plaintiff protested, but subsequently sold a portion of the crop, and paid the amount demanded.

The plaintiff contended that the second mortgage was given merely in renewal of the first; that, in fixing the amount, a payment made by him had not been taken into account, with the result that a larger sum was secured than he really owed; that he had signed the document without reading it, or knowing the amount set out; and that before the seizure he had paid all he really owed.

The County Court Judge gave judgment for the plaintiff for the amount paid, with an addition of $10 for the trespass.

The defendants appealed.

The principal question in controversy related to the jurisdiction of the County Court to entertain the action.

Held, that the appeal must be allowed, and a nonsuit entered in the original action; the plaintiff to pay the costs of the action and of the appeal.

The question of the jurisdiction of the County Court was wholly one of the construction of the statute. Upon the principles of the common law the plaintiff was liable for the full amount of the second mortgage. The recital under seal estopped him, and he could have had no defence to an action upon the covenant for the full amount. Money paid under this covenant could not have been recovered back at law. As the County Court could not have entertained a suit to rescind or rectify the second mortgage, or to have it declared satisfied, it appeared to follow that it could not exercise an equitable jurisdiction to adjudge repayment of the money. In no view did it seem possible to support the action.

Foster v. *Reeves*, [1892] 1 Q. B. 255, followed.

Howell, Q.C., for the plaintiff.

Culver, Q.C., for the defendants.

[DUBUC, J., 25TH FEBRUARY, 1898.

PEARSON v. CANADIAN PACIFIC R. W. CO.

Master and servant—Action under Lord Campbell's Act and Workmen's Compensation Act—Parties—Widow as plaintiff—Administrator refusing to join—Allegation that deceased was a "workman"—Pleading—Demurrer.

Demurrer to the plaintiff's statement of claim.

The plaintiff was the widow of Peter Pearson, who was drowned by accident while in the service of the defendants.

The brother of the deceased had been appointed administrator; he was in the service of the defendants, and refused to bring any action against them.

The plaintiff brought her action under the Act respecting compensation to families of persons killed by accident, R. S. M. c. 26, and under the Workmen's Compensation for Injuries Act, 56 V. c. 59, as amended by 58 & 59 V. c. 48.

Two points were raised by the demurrer:—

1. That the deceased husband of the plaintiff was not alleged in the statement of claim to be a workman within the meaning of the statutes.

2. That the plaintiff could not bring the action in her own name, but that it had to be brought by the administrator of the estate of her deceased husband.

Held, 1. That the allegation in the seventh paragraph of the statement of claim, that the deceased was in the service of the defendants as one of their workmen in the operation of their railway line, was a sufficient designation of him as a workman within the meaning of the statutes: *Leech* v. *Gartside*, 1 Times L. R. 391.

2. That the Workmen's Compensation for Injuries Act, 1893, should be read as one Act with R. S. M. c. 26. The last mentioned Act says that the action shall be brought by and in the name of the executor or administrator, and the other Act does not say that it can be brought otherwise, or that the widow of the deceased workman can bring it in her own name.

Demurrer allowed without costs.

Howell, Q.C., for the plaintiff.

Aikins, Q.C., and *Culver*, Q.C., for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 21ST JANUARY, 1898.

PACIFIC INVESTMENT CO. v. SWANN.

Appeal—Order dissolving injunction—Interim injunction pending appeal—Security—Terms—Proviso.

Subsequent to the issue of the order in pursuance of the decision of SCOTT, J., *ante* 97, *McCaul*, Q.C., for the plaintiffs, applied on notice for an order for an interim receiver or injunction pending a proposed appeal from such order.

Muir, Q.C., for the defendant.

ROULEAU, J., after consultation with SCOTT, J., made an order in the following terms:—"The plaintiffs desiring to enter and prosecute an appeal from the said order dissolving the said injunction, and undertaking . . . to give security for costs of said appeal by paying into Court . . . $200, with the usual undertaking as to damages: It is ordered that . . . the receivers in the said action of *Barter* v. *Swann* be and they are hereby restrained and enjoined, until after the hearing or other disposition of a proposed appeal by the plaintiffs from the said order, from paying over to the defendant Swann any sum or sums of money now or hereafter payable to said defendant by the said receivers in *Barter* v. *Swann*; or from delivering or transferring to the said defendant Swann any cheque, note, security, or property, in payment or satisfaction of any claim of the defendant Swann on the said receivers; subject, however, to this proviso, that, unless the plaintiffs substantially succeed in this appeal, the defendant is not to be prejudiced by this order, nor shall the plaintiffs be allowed to take any advantage of this order so as to stand in any better position as to any moneys so payable to the defendant Swann, whether before or after judgment in this action or in respect to any assets of the said defendant, than if this order had never been made, but, nevertheless, this order and the above proviso shall not in any other respect interfere with the rights of the plaintiffs, whether before or after judgment, whether by way of garnishment, attachment, execution, equitable execution, or otherwise howsoever."

Supreme Court of Canada.

ONTARIO.] [9TH DECEMBER, 1897.

WASHINGTON v. GRAND TRUNK R. W. CO.

Railways—Negligence— Packing of railway frogs—Statutes—Construction of—51 V. c. 29, s. 262, s.-ss. 3, 4 (D.)

The proviso of s.-s. 4 of s. 262 of the Railway Act, 51 V. c. 29 (D.), does not apply to the fillings referred to in s.-s. 3, and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings, and the fixed rails of switches, during the winter months.

Judgment of the Court of Appeal, 24 A. R. 183, 17 Occ. N. 117, reversed.

Lynch-Staunton, for the appellant.

McCarthy, Q.C., for the respondents.

HAGGERT v. TOWN OF BRAMPTON.

Fixtures—Machinery—Constructive annexation to freehold—Mortgagor and mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures, with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold; and where articles have been only slightly affixed, but in a manner appropriate to their use, and showing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises, or of improving their usefulness for the purposes to which they

have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that, both as to the degree and object of the annexation, they became parts of the realty.

Judgment of the Court of Appeal affirmed.

Aylesworth, Q.C., and *Justin*, for the appellant.

T. J. Blain and *D. O. Cameron*, for the respondents.

QUEBEC.]

GLENGOIL STEAMSHIP CO. v. PILKINGTON.

GLENGOIL STEAMSHIP CO. v. FERGUSON.

Maritime law—Affreightment—Carriers—Charterparty—Privity of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Contract against liability for fault of servants.

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage, where the exclusive control and navigation of the ship are left with the master, mariners, and other servants of the owners, and the contract has been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship-owners from liability for damages caused through improper or insufficient stowage.

A condition in a bill of lading providing that the ship-owners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling, or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding, and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act,

fault, neglect, or error in judgment of the pilot, master, mariners, or other servants of the ship-owners, nor for breakage, or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods, and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

Judgment of the Court below affirmed.

Atwater, Q.C., and *Duclos*, for the appellants.

MacMaster, Q.C., and *Farquhar Maclennan*, for the respondents.

COWANS v. MARSHALL.

Negligence—Breach of duty—Injury occasioned thereby—Pleading—Evidence—Finding of jury—New trial.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to show the breach of a duty owed him by the defendant, and inconsistent with due diligence on the part of the defendant, and that the injury was thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injury, a verdict for the plaintiff cannot be sustained, and a new trial should be granted.

Judgment of the Court below reversed.

Lajoie, for the appellants.

Trenholme, Q.C., and *Ryan*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ARMOUR, C.J.] [10TH MARCH, 1898.

In re BIRELY AND TORONTO, HAMILTON AND BUFFALO R. W. CO.

Appeal—Railways—Expropriation—Award—51 V. c. 29, s. 161 (D.)

Under s. 161 of the Dominion Railway Act, 51 V. c. 29, an appeal lies in this Province by either party from an award of compensation exceeding $400, either to the Court of Appeal or to the High Court of Justice, but, if an appeal is taken to the latter tribunal, no further appeal lies by either party to the Court of Appeal.

Appeal from the decision of ARMOUR, C.J., 28 O. R. 468, 17 Occ. N. 239, quashed.

Aylesworth, Q.C., and *F. R. Waddell*, for the landowner.

D'Arcy Tate, for the company.

[15TH MARCH, 1898.

HILL v. BROADBENT.

Deed—Description—Appurtenances—R. S. O. 1877 c. 102, s. 4.

The general words in the Short Forms of Conveyances Act, R. S. O. 1877 c. 102, s. 4, will not pass lands and buildings not embraced in the specific description, merely because the lands and buildings have been held, used, occupied, and enjoyed with the property specifically described by metes and bounds.

Judgment of ARMOUR, C.J., affirmed.

W. R. Riddell, for the appellants.

Lynch-Staunton and *Lazier*, for the respondents.

WEBSTER v. CHICKMORE.

Bankruptcy and insolvency—Assignments and preferences—Presumption—Rebuttal—Pressure.

Where a preferential security is attacked within sixty days, pressure is of no avail to rebut the presumption of invalidity.

Judgment of ARMOUR, C.J., reversed; BURTON, C.J.O., dissenting.

E. B. Ryckman and *C. W. Kerr*, for the appellant.

J. B. Clarke, Q.C., for the respondents.

LONG v. ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Benefit society—"Renewed contract"—55 V. c. 39, s. 33.

It is not a renewal of a contract of insurance within the meaning of s. 33 of the Insurance Corporations Act, 1892, but a revival of the original contract, when, after default in payment of assessments and consequent suspension of rights, a member of a benefit society pays the assessments, and, pursuant to the rules of the society, becomes, *ipso facto*, re-instated.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *Totten*, Q.C., for the appellants.

Lynch-Staunton, for the respondent.

FERGUSON, J.]

ST. DENNIS v. SHOULTZ.

Malicious prosecution—Reasonable and probable cause—Advice of counsel—Malice—Jury.

That the prosecution in question was instituted on the advice of counsel, is not sufficient to protect the prosecutor, if he does not exercise reasonable care to ascertain and lay before the counsel the facts in reference to the alleged offence.

Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must is t, and the question of malice must be left to the jury.

Judgment of FERGUSON, J., reversed.

M. K. Cowan, for the appellant.

W. H. P. Clement, for the respondent.

SMITH v. ONDERDONK.

Negligence—Hire of chattels—Contract—Sub-contract—De ect—Damages—Liability.

A contractor for the excavation of a railway tunnel, who, pursuant to the terms of the sub-contract, supplies to a sub-contractor a locomotive for use in the work, is not liable in damages to one of the sub-contractor's workmen for injuries sustained by reason of a defect in the locomotive, that defect being a patent one, and the sub-contractor having accepted the defective locomotive without objection.

Judgment of FALCONBRIDGE, J., reversed.

Crerar, Q.C., and *D. W. Saunders*, for the appellants.

W. Nesbitt, for the respondent.

MACMAHON, J.]

YELLAND v. YELLAND.

Life insurance—Benefit society—Certificate—Change in Rules—Beneficiaries.

A certificate issued by a benefit society providing for payment to the member's "next of kin," is not affected by a subsequent change of the rules of the society omitting "next of kin," by that name, from the classes of persons to whom certificates may be made payable.

Judgment of MACMAHON, J., affirmed.

Watson, Q.C., and *W. H. Moore*, for the appellants.

Poussette, Q.C., for the respondent.

ROWAN v. TORONTO R. W. CO.

Jury—Findings—Interpretation of—Negligence—Contributory negligence—Street railways.

Judgment of MACMAHON, J., 17 Occ. N. 242, affirmed.

E. F. B. Johnston, Q.C., and *James Ross*, for the plaintiff.

J. Bicknell, for the defendants.

STREET, J.]

FISHER v. FISHER.

Life insurance—Construction of policy—Designation of beneficiary—R. S. O. 1887 c. 136.

An application for life insurance stated that the insurance money was to be paid to the applicant's wife, and the policy as issued provided that the insurance money should, upon the death of the assured, be paid to his wife, or such other beneficiary or beneficiaries as he might in his lifetime have designated in writing indorsed on the policy, and, in default of any such designation, to his legal personal representatives.

Held, OSLER, J.A., dissenting, that the policy came within the Act to secure to wives and children the benefit of life assurance, R. S. O. 1887 c. 136, and was not affected by an absolute assignment, indorsed upon it, by the assured to a creditor.

Judgment of STREET, J., 28 O. R. 459, 17 Occ. N. 243, reversed.

McCarthy, Q.C., *W. J. McWhinney*, for the appellant.

Aylesworth, Q.C., for the respondent.

BOARD OF C. C. JUDGES.]

In re TORONTO RAILWAY COMPANY ASSESSMENT.

Assessment and taxes—Toronto Railway Company—Rails, poles, and wires—Highways—Street railway.

The rails, poles, and wires of the Toronto Railway Company, used by them in operating their electric railway, and laid and erected in and upon the public highways of the city of Toronto, are subject to assessment under the Consolidated Assessment Act, 1892, 55 V. c. 48; BURTON, C.J.O., dissenting.

Fleming v. *Toronto Street R. W. Co.*, 37 U. C. R. 116, has been overruled by *Consumers' Gas Company* v. *City of Toronto*, 27 S. C. R. 453.

Robinson, Q.C., and *Fullerton*, Q.C., for the City of Toronto.

McCarthy, Q.C., and *Laidlaw*, Q.C., for the Toronto Railway Company.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 7TH FEBRUARY, 1898.

WARDENS OF ST. MARGARET'S CHURCH, TORONTO, v. STEPHENS.

Nuisance—Church—Band of music on adjoining premises—Disturbance of public worship—Injunction.

In an action by the churchwardens and trustees of a church, wherein week day services were held, to restrain the defendants from continuing to allow a band of music to play in an adjoining skating rink, which had the effect of disturbing the services:—

Held, that the use by the plaintiffs of the church in that way was an ordinary, reasonable, and lawful use of their property, and the inconvenience to them and the congregation was such as to materially interfere with the use and enjoyment of it, and that the defendants' use of their property was not a natural and ordinary one, but a non-natural and extraordinary one, though, apart from the question of nuisance, not an unlawful one; and an injunction was properly granted restraining the defendants from allowing the band to play at such times as would disturb the congregation at worship.

Per ROSE, J.—It would be no answer in law to the action to show that the plaintiffs had not complained to the former owners of the rink, of the nuisance caused by the music.

Judgment of MEREDITH, J., affirmed.

McCarthy, Q.C., and *A. McLean Macdonell*, for the defendants.

H. T. Beck, for the plaintiffs.

[14TH FEBRUARY, 1898.

EWING v. CITY OF TORONTO.

Municipal corporations—Highway—Non-repair—Hinge on trap-door on sidewalk—Accident—Negligence.

Let into the sidewalk upon one of the streets of the city of Toronto, there was a trap-door leading to a cellar of abutting

premises. The door was about eight feet long, but divided in the centre into two parts, and opening therefrom, having three hinges on each half, fastened to the door by straps or flaps, which were half an inch above the level of the door, the movable part of the hinge extending an inch or an inch and one-sixteenth above the level of the sidewalk, and being of the same length as the width of the flap, and about three-quarters of an inch in width. After nightfall, on a night which was not dark, the place also being lighted by an electric lamp on the opposite corner of the street, though the plaintiff's body and the shadow from it to some extent obstructed the light, the plaintiff, while walking on the sidewalk, struck his toe against one of the centre hinges, and stumbled and fell, injuring himself. The plaintiff was well acquainted with the locality, having passed over the place at least once or twice a day for the previous three years.

Held, that there was no liability imposed on the corporation; for the existence of the hinges, having regard to the purpose for which they were placed where they were, and the other circumstances of the case, did not constitute a breach of the defendants' statutory duty to keep in repair.

Ray v. *Town of Petrolia*, 24 C. P. 78, considered.

John MacGregor and *R. G. Smyth*, for the plaintiff.

Fullerton, Q.C., for the defendants.

Lount, Q.C., for the third party.

REGINA v. GRAHAM.

Costs—Removal of conviction into High Court—Subsequent application in High Court—Costs of, ordered to be paid to clerk of peace—Jurisdiction to so order—Criminal Code, ss. 897, 898—"Appeal"—Sessions—Rescission of order as to costs made without jurisdiction—Forum.

The costs referred to in ss. 897 and 898 of the Criminal Code are those dealt with by the General Sessions of the Peace, when a conviction or order is affirmed or quashed on appeal to it; but not the costs of an application to a Judge of the High Court after a conviction has been removed by *certiorari* into that Court.

After the removal by *certiorari* of a conviction of the defendant into the High Court, the magistrate who had made the

conviction moved to have an affidavit filed by the defendant removed from the files of the Court, which motion was refused with costs payable by the magistrate to the defendant; but subsequently, under the belief that ss. 897 and 898 of the Code applied, the defendant obtained an *ex parte* order varying the previous order by making the costs payable to the clerk of the peace, and by him to the defendant.

A motion to a Judge of the High Court to set aside the amended order was dismissed; but an appeal from such dismissal, and an appeal, by leave, direct from the amended order, were allowed, and the order set aside by a Court of three Judges.

The Judge of the High Court, sitting in the Weekly Court, has no power to entertain a motion of the kind.

DuVernet and *S. B. Woods*, for the police magistrate.

Murphy, Q.C., for the defendant.

REGINA v. FITZGERALD.

Summary conviction—Rule nisi to quash—Death of prosecutor—Effect of.

Where, after a rule *nisi* had been obtained to quash a magistrates' conviction, but before service thereof, the prosecutor died, and service of the rule had been effected on the magistrates only :—

Held, that, notwithstanding such death, the Court might deal with the matter; and the rule was made absolute to quash the conviction.

Douglas Armour, for the defendant.

No one contra.

SMITH v. HAYES.

Negligence—Injury to infant—Dangerous machine—Duty of owner of—Trespasser.

The plaintiff, a child of five years of age, was injured by a horse power used by the defendant to hoist grain into his warehouse. The machine was on a lot, unfenced on one side, leased by him, adjoining his warehouse, about thirty feet from the highway.

Held, that, as the evidence did not show that the machine was being worked in such proximity to the highway as to endanger the safety of persons using the highway, or that it was so situated as to attract or allure children, or any knowledge in the defendant that children were in the habit of frequenting the place, or any intention on his part to injure, and, as the plaintiff had no right to be where he received the injury, he could not recover.

Finlay v. *Miscampbell*, 20 O. R. 29, followed.

Judgment of MEREDITH, J., affirmed.

Aylesworth, Q.C., for the plaintiff.

J. B. Jackson, for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 10TH FEBRUARY, 1898.

FARQUHARSON v. IMPERIAL OIL CO.

Rivers and streams—Riparian owners—Soil of stream—Erection of dams—"Any other obstruction"—R. S. O. 1887 c. 120, s. 1.

The owner of the soil on both sides of a running stream, whether navigable or not, is, *prima facie*, the owner of the soil which forms the bed of the stream; and the owner of the soil on each side is, in the same manner, owner of the soil of the bed up to the centre of the stream; and dams constructed by such owners, or with their consent, over their parts of the stream, are not wrongfully erected.

The words "any other obstruction" in R. S. O. 1887 c. 120, s. 1, do not comprehend the erection of dams, but only other obstructions of a like kind with felling trees.

Aylesworth, Q.C., and *A. E. Shaunessy*, for the plaintiff.

Osler, Q.C., for the defendants.

MINHINNICK v. JOLLY.

Fixtures—Intention to sever from freehold—No actual severance—Subsequen purchaser of freehold—Rights of.

The mere expression by the owner of an intention to sever

a fixture from the freehold and sell it to another, even if communicated to one who becomes a subsequent purchaser of the freehold, would not operate to convert a part of the freehold into a chattel, or to alter its character in any way; and, in the absence of any reservation in the conveyance, everything attached to the freehold passes to the purchaser.

Judgment of MEREDITH, J., reversed.

Aylesworth, Q.C., for the defendant.

Rowell, for the plaintiff.

[BOYD, C., MEREDITH, J., 1ST MARCH, 1898.

McDONALD v. TOWNSHIP OF YARMOUTH.

Municipal corporations—Tiles placed on side of highway—Accident—Negligence.

On the side of a township road there was a fill of about fourteen feet, with railings on either side, and for the purpose of repairing a culvert which ran through the fill, a quantity of tiles, of a large size and a light gray colour, were piled on the side of the highway, in a slight hollow behind the railing, having some planks thrown over them, and a board nailed between the two boards forming the railing, so as to further hide the tiles from view.

Held, that this did not constitute evidence of negligence on the defendants' part so as to render them liable for injuries sustained by the plaintiff by reason of the horse which he was driving becoming frightened at the tiles and running away.

Judgment of MACMAHON, J., affirmed.

J. A. Robinson, for the plaintiff.

J. M. Glenn and *W. L. Wickett*, for the defendants.

SAUNDERS v. CITY OF TORONTO.

Municipal corporations — Carters employed to remove street sweepings—Master and servant—Negligence—Liability.

In an action brought against a city corporation for injuries sustained by the plaintiff, by being run down, while riding a

bicycle along one of the streets, by a licensed carter employed in removing to a dumping-ground street sweepings which were placed in piles on the side of the street, it was shown that the carter owned the horse and cart he was driving, but was hired by the officer of the city corporation having charge of this work, and received his orders from the foreman of the streets commissioner's department, which were, where to get the stuff and where to dump it, and to go and return by the shortest route, and for failure to carry out his orders he was subject to dismissal. He worked all day, consisting of nine hours, and was paid twenty-eight cents per hour. He had been occasionally hired in the spring and fall of the year, when this work required to be done, and had been at work off and on during this particular season, and for two weeks constantly prior to the accident happening. A city by-law was proved which provided that the committee which had charge of this work might provide such scavenger carts as they might deem necessary, each cart to be supplied with one horse and the necessary appurtenances, and controlled by one man, the man and cart to be under the charge of the officers of the department whose duty it was to see to the cleaning of the lanes and streets.

Held, that the relationship of master and servant existed between the city corporation and the carter at the time the accident occurred, and a nonsuit entered at the trial was set aside, and a new trial directed.

Gash, for the plaintiff.

Fullerton, Q.C., for the defendants.

[MEREDITH, C.J., 8TH MARCH, 1898.

MAGANN v. FERGUSON.

Bankruptcy and insolvency—Assignment for benefit of creditors—Landlord and tenant—Liquidated claim—Damages for overholding—4 Geo. II. c. 28, s. 1.—Right to rank on estate.

Damages against an overholding tenant under 4 Geo. II. c. 28, s. 1, at the rate of double the yearly value of the land, do not constitute a liquidated claim, and a landlord cannot rank on an insolvent estate in the hands of an assignee for creditors in respect to them, even after he has recovered judgment therefor.

Grant v. *West*, 23 A. R. 533, followed.

A. C. Macdonell, for the plaintiff.

Rowell, for the defendant.

[MacMahon, J., 23rd March, 1898.

ROBERTS v. COUGHLIN.

Security for costs—Infant plaintiff out of jurisdiction—Next friend.

An infant, residing out of the jurisdiction, brought an action for administration, by her mother, who resided in the jurisdiction, but was without substance, as next friend.

Held, that the plaintiff could not be required to furnish security for costs.

Magee, Q.C., for the plaintiff.

Woods, Q.C., for the defendants.

[Street, J., 19th March, 1898.

ANDREW v. CANADIAN MUTUAL LOAN AND INVESTMENT COMPANY.

Payment—Identity of payee—Payment to garnishing creditors of another person of same name—Division Courts—Orders of—Protection—Interest.

An action to recover $533.65 and interest. The plaintiff was a shareholder in the defendant company. When he first took his shares he was living at Cornwall, whence he moved to Streetsville. After living in Streetsville for about a year, he left there on the 24th March, 1894, and went to the state of Missouri. Before leaving, he wrote informing the defendants of his intention, and asked to have any correspondence addressed to him at West Plains, Missouri. During 1894 and 1895 he wrote to the defendants upon matters connected with his shares, and they answered his letters, to his address there. An indorsement on his shares certificate notified him to advise the defendants of any change of address. When he took his shares, his address was entered in the defendants' books as Cornwall; Streetsville was afterwards substituted; but no subsequent change was made.

In March, 1896, under a by-law of the defendants, the directors "retired" the plaintiff's shares, the effect of which was that $548.65, representing the value thereof, was placed to his credit in the defendants' books, and he ceased to be a shareholder. Upon the day that this was done, the defendants' secretary wrote a letter addressed to the plaintiff at Streetsville, notifying him, and asking him to return his certificate and draw the money. No reply being received, a second letter, addressed in the same way, was written to him on 22nd May, 1896. Neither letter was received by the plaintiff, and he remained in ignorance of what had been done. Shortly before July, 1896, the plaintiff sent to the company's agents at Cornwall the coupon for interest due 1st July, 1896, which the defendants paid, and charged against the money at his credit in their books, reducing it to $533.65.

It happened that while the plaintiff resided at Streetsville, another man of the same name—William Andrew—also lived there, having Streetsville as his post-office address. He was not related to the plaintiff, nor personally known to him, but the plaintiff was aware of the fact, and in writing to the defendants several times gave his address as "William Andrew, Box No. 550, Streetsville, Ont." In 1894 the other William Andrew went to live in Winnipeg, leaving a number of unpaid creditors in Ontario, who, by some means or other, were led to believe that the money then lying at the plaintiff's credit was the property of their debtor, and they took proceedings in the Division Court and garnished the money, serving the primary debtor (under a special order) by means of a registered letter addressed to William Andrew, Winnipeg, Manitoba. The defendants and their solicitors were ignorant of the fact that the primary debtor was not the man for whom they held the money, and the whole of the money belonging to the plaintiff was paid by the defendants either into Court or directly to the attaching creditors, without a suspicion on the defendants' part of the wrong done to the plaintiff. About 12th October, 1897, the plaintiff first became aware of the retirement of his stock and of the disposition made of the proceeds. The defendants refused to pay him any money, relying upon the orders of the Division Court as their protection, and in this action, which was begun on the 5th November, 1897, they set up these orders and the 195th section of the Division Courts Act as their protection.

Held, that there was nothing in these proceedings to bar the plaintiff of his right to recover his money from the defendants, or to protect them against his claim. He was not a party to such proceedings, and the judgment therein did not apply to money in their hands belonging to him, but to money which they erroneously supposed to be in their hands belonging to the other William Andrew: *Farquhar* v. *City of Toronto*, 12 Gr. 186, 192; *Re Fair* v. *Bell*, 2 A. R. 632. The plaintiff's money was still in their hands. Section 195 protects them only against being called upon by the primary debtor to pay it over again, and not against any third person.

The plaintiff was also entitled to interest, as the defendants should have notified him at his proper address, which they had been informed of, and to which they had addressed letters, although they had not entered it in their books.

J. Denovan, for the plaintiff.

Watson, Q.C., and *A. McLean Macdonell*, for the defendants.

IN CHAMBERS.

[MacMahon, J., 4th March, 1898.

DAVIS v. TAEGER.

Security for costs—Plaintiffs out of the jurisdiction—Judgment by default—Defendant allowed in to defend on terms.

The plaintiffs, in an action to recover $4,500 upon a bond, resided out of the jurisdiction, and the writ of summons was so indorsed. The defendant appeared, but failed to deliver a statement of defence, and judgment for the plaintiffs was entered upon default, which the defendant moved to set aside, and an order was made allowing the defendant in to defend on terms of paying costs, paying $100 into Court to answer the plaintiffs' future costs, and providing further that the judgment and execution issued thereon should stand as security for the plaintiffs' claim. The defendant paid the costs and paid the $100 into Court, and then delivered a statement of defence, and issued and served a præcipe order upon the plaintiffs for security for costs, which the plaintiffs moved to set aside.

Wyld, for the motion, contended that the defendant, being allowed in on terms, was now the *actor*, and was not entitled to security, citing *Doer* v. *Rand*, 10 P. R. 165; *Exchange Bank* v. *Barnes*, 11 P. R. 11; *Thibaudeau* v. *Herbert*, 16 P. R. 420; *Walters* v. *Duggan*, 17 P. R. 359.

R. V. Sinclair, for the defendant.

MACMAHON, J., set aside the præcipe order with costs.

[STREET, J., 25TH MARCH, 1898.

CAMPBELL v. FARLEY.

Parties—Claim against partnership—Administratrix of deceased partner—Concurrent administration proceedings—Action against surviving partner—Indemnity—Relief over—Third party procedure.

At law, as well as in equity, before the Judicature Act, a partnership debt was, in strictness, joint and not several, and upon the death of one partner the only liability existing at law was that of the surviving partner; the estate of the deceased partner being only made available through the equities existing in favour of the surviving partner, which the partnership creditors were allowed to make use of; and the Act has not converted into a joint and several debt that which had theretofore been merely joint.

Kendall v. *Hamilton*, 4 App. Cas. 504, and *In re Hodgson*, 31 Ch. D. 177, followed.

And in an action by creditors of a partnership against the surviving partner and the administratrix of the estate of the deceased partner, the name of the administratrix was struck out, leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, and to proceed concurrently with the action against the surviving partner.

Held, also, that a claim of the surviving partner against the estate of the deceased for indemnity or relief over in respect of the plaintiffs' claim, must be made in the administration proceedings, and not in the action under the third party procedure.

Held, further, that the right of the surviving partner against the administratrix, in her personal capacity, to recover upon a mortgage given by her, as a security to him against his liability

to the plaintiffs, was neither a right to indemnity nor to relief over, because it was a right which might be enforced before he was damnified, there being no reference on the face of the instrument to the liability asserted by the plaintiffs; and, therefore, she could not be brought in as a third party.

J. H. Moss, for the plaintiffs.

Tremeear, for the defendant Farley.

W. E. Middleton, for the defendant MacDonald.

[MEREDITH, J., 21ST MARCH, 1898.

ORFORD v. FLEMING.

Solicitor—Charging order—Rule 1129—"Property"—Judgment—Assignment—Notice—Taxation of costs—Sale of judgment.

An application under Rule 1129, by the solicitors who obtained on behalf of the plaintiff a judgment in the High Court for the recovery of money from the defendant, for an order charging their costs upon the judgment debt. Previous to the application the judgment had been assigned by the plaintiff to the mother of the defendant.

Rule 1129 is new in Ontario, and is as follows:

"(1) Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a Judge thereof, to declare such a solicitor . . . to be entitled to a charge upon the property, of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; and upon such declaration being made, such solicitor . . . shall have a charge upon and against and a right to payment out of the property so recovered or preserved, for the taxed costs, charges and expenses of or in reference to such cause, matter or proceeding; and all conveyances and acts done to defeat, or which may operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right.

"(2) The Court or Judge may make such order for taxation of such costs, charges and expenses and for the raising and

payment of the same out of the said property as may seem just. . . ."

Held, following *Birchall* v. *Pugin*, L. R. 10 C. P. 397, that the judgment debt was "property" within the meaning of the Rule.

Held, also, upon the facts that the assignment was not to a *bona fide* purchaser for value without express notice; but even if there were no express notice, that, following *Cole* v. *Eley*, [1894] 2 Q. B. 180, the assignee must be taken to have notice of the solicitor's lien, for she was buying a judgment debt, and the implied notice she would have would be notice within the meaning of the Rule.

An order was made for the taxation of the costs of the action and of this application, declaring the applicants entitled to a charge upon the judgment for the amount which should be taxed, and directing that such amount should be raised and paid out of the judgment by a sale thereof.

W. R. P. Parker, for the applicants.

Coatsworth, contra.

[28RD MARCH, 1898.

WINCH v. TRAVISS.

Arrest—Discharge—Failure to deliver statement of claim—Rule 1044—Extension of time—Rule 353—Terms.

Under the present practice, there is power after the expiration of the time appointed by Rule 1044 for the delivery of the statement of claim, where a defendant is detained in custody under an order for arrest, to extend the time. The case is within Rule 858, and the wording of Rule 100 of the Rules of Trinity Term, 1896, has been altered from "shall have been given" to "is given" in Rule 1044.

Where the statement of claim was delivered two days after the month had expired, and the defendant moved for his discharge, an order was made validating it for all purposes, upon terms as to speedy trial and payment of costs.

C. C. Robinson, for the plaintiff.

C. Millar, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[TOWNSHEND, J., 11TH MARCH, 1898.

PITFIELD v. GUEST.

Particulars—Replevin—Deed of assignment—Plea of fraudulent purpose and intent—Statute of Elizabeth—Particulars of fraud.

This was an action of replevin against the sheriff of Yarmouth. The defendant pleaded, *inter alia*, that the deed of assignment under which the defendant claimed, (*a*) was made "for the purpose and with the intent to defraud, hinder, and delay the creditors of the grantor," etc., and (*b*) that the deed "is void under 13 Eliz. c. 5, as hindering and delaying creditors." The plaintiff moved under Order 19, Rule 7, for further and better particulars of the fraud pleaded as aforesaid, citing *The Rory*, 7 P. D. 121, and *Wallingford* v. *Mutual Society*, 5 App. Cas. 701.

Held, that the motion must be refused with costs. The plea of purpose and intent has a well-settled meaning and indicates all that can reasonably be asked. It is not such a general allegation of fraud as is mentioned in the cases cited by the applicant. It is as definite as is necessary. The defence of the statute of Elizabeth is specifically set up; and what that defence means, and the evidence required under it, are too well known to take anyone by surprise.

J. A. Chisholm, for the motion.

Ernest Gregory, contra.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 5TH MARCH, 1898.

WHITLA v. PHAIR.

Contract—Construction—Rectification—Satisfaction of debts—Agreement to accept interest in mining location, if valuable—Conditions not fulfilled.

Action upon promissory notes given by the defendant and for the price of goods supplied to him. The defence was that by an agreement made between the defendant, of the first part, and the plaintiff and three other creditors of the defendant, whose claims had been assigned to the plaintiffs, of the second part, the debts had been settled and extinguished. By the written agreement dated 31st July, 1896, it was agreed that the plaintiffs and the other creditors should expend at least $1,000 in prospecting and developing a certain mining location, owned by the defendant, on the terms that in case it was shown by such development that the location was valuable, or likely to prove valuable with further development—of which fact the parties of the second part should be sole judges—the parties of the second part should incorporate a company, to which the mining location should be transferred for a consideration of one-half the stock to the defendant, and the other half to the creditors. It was also agreed that in the event of the mine proving valuable and being accepted and a company formed, the parties of the second part should, from the proceeds of their half interest in the mine, pay the then indebtedness of the party of the first part to them; provided, however, that the mining location should be re-conveyed to the party of the first part free from all incumbrances, if the agreement was not carried into effect by the formation of the company within twelve months.

Before they had sufficiently operated and tested the mining location to declare it valuable, the creditors obtained letters patent of incorporation of a company, and proceeded to develop the mine.

After spending more than $1,000 in developing, they came to the conclusion that the mine was not likely to prove valuable, and notified the defendant of their so deciding. They then brought the present action, which was tried before BAIN, J., who entered a verdict for the plaintiffs. The defendant appealed, contending that by the plaintiffs forming a company, as they had done, to operate the mine, the agreement was carried into effect, and the plaintiffs could not recede from it; that by their so doing they had waived the condition of further investigation of the mine, and were estopped from declaring that it was not likely to prove valuable. He also asked for rectification of the written instrument, as it did not embody the true terms of the agreement made by him with the plaintiffs.

Held, that the appeal should be dismissed with costs. The evidence showed that it was for the purpose of convenience and in the interest of all parties that the company was formed before the other conditions had been fulfilled. The defendant himself was a party to this arrangement, and assisted in investigating the mine to find out whether it would prove valuable or not, after he knew that a company had been formed. The formation of a company was only one of the three conditions by the performance of which the agreement was to be considered as carried into effect. The defendant had not established that there had been a mistake, or in what form the rectification should be. The creditors spent more money than they were bound to do to develop and test the mine. By the agreement they were to be the sole judges of the fact that the mine was valuable or likely to prove so. It was clear from the evidence that they never decided that the mine was valuable or likely to prove so, and they never accepted it as such. Two of the three conditions were unfulfilled, and the defendant could not claim the benefit of the advantage which would have accrued to him, had the agreement been actually carried into effect.

Haggart, Q.C., and *Whitla*, for the plaintiffs.

Patterson, for the defendant.

HUTCHINGS v. ADAMS.

Principal and agent—Undisclosed principal—Liability of, for goods supplied to agents.

County Court appeal. One Piper, having become insolvent,

entered into an agreement with the defendant, dated 6th February, 1894, whereby he assigned to the defendant all the goods and stock contained in his shop, Piper agreeing "to remain in charge of the business and to carry on the same for and on behalf" of the defendant, he remitting all moneys received to the defendant, who was to pay the same to Piper's creditors. Piper further agreed to carry on the business for the defendant in accordance with instructions received by him in that respect, and to give only such credit as was authorized by him and the defendant. The plaintiff had for some years before the date of the agreement sold goods to Piper, and continued to sell to him after that date until January, 1898. During all that time he believed Piper to be carrying on the business for himself in the ordinary way, and the goods, the price of which was the subject of this action, were sold and shipped to Piper in that belief and in ignorance of the fact that the defendant had anything to do with the business; he subsequently discovered that the defendant was the real owner of the business, and brought this action to recover the amount due for goods sold.

The case was tried before CUMBERLAND, Co. J., who entered judgment for the plaintiff. The defendant appealed.

Held, that the County Court Judge was right in holding that, by the agreement of 6th February, 1894, Piper was constituted the general agent of the defendant for taking charge of and carrying on the business, and that it was within the scope of Piper's authority, as such agent, to order such goods as would be required for carrying on the business. If they were ordered for the business, the defendant was liable for their price. Under the agreement the defendant became the owner of the business for the time being, and the relationship between him and Piper was that of principal and agent, and not merely mortgagor and mortgagee. The fact that he was acting as trustee for Piper's creditors in carrying on the business did not relieve him from liability for the acts of the agent that he placed in charge of the business.

Nugent, for the plaintiff.

A. D. Cameron and *Clark*, for the defendant.

[TAYLOR, C.J., 11TH MARCH, 1898.

ALLAN v. MANITOBA AND NORTH-WESTERN R. W. CO.

GREY v. MANITOBA AND NORTH-WESTERN R. W. CO.

Railway company—Receiver—Application for leave to bring action against company—Receiver in possession of railway—Ex parte motion.

Motion by two holders of bonds issued by the defendant company and secured by a mortgage made to Grey and Heron, as trustees, for leave to bring an action to administer the trusts of the mortgage deed, for a declaration that the power of sale and other powers contained in that deed were valid, and for a declaration of the true construction of the mortgage as to certain matters.

The leave was asked because the company were to be made parties, and in both the above-mentioned actions against the company receivers had been appointed.

The application was made *ex parte*.

Held, that the application should be granted. Although granting leave may not be of course, yet, where the applicant shows that there is a question which he may reasonably raise against the receiver, or as to the property of which he is in possession, then leave should be given.

In Daniell's Practice, p. 1593, it is said that such applications are usually made by motion or summons, on notice, but may be by petition. Numerous cases show they were so made, but they were cases in which the leave was sought to take proceedings directly against the receiver, or to interfere with the possession of property of which he was actually in possession: *Lane* v. *Capsey*, [1891] 3 Ch. 411. Here neither of the receivers was in possession of the property; they were only receivers of the revenues, tolls, and profits; the possession and management of the railway remaining in the hands of the company.

That the receivers were not in any sense in possession of the property secured to warrant a distinction in the practice.

Howell, Q.C., and *Mathers*, for the applicants.

PHILLIPPS v. PROUT.

Mortgage—Foreclosure—Account—Bonus for indorsing note—Payment of—Appeal by subsequent incumbrancers.

The plaintiff alleged in his statement of claim that, at the request of, and for the accommodation of the defendant, he indorsed a promissory note, receiving as an indemnity conveyances of certain lands, which, it was admitted, although absolute in form, were made only as security and indemnity. The plaintiff had paid the note. The relief prayed was an order for payment of the amount due, and, in default, foreclosure of the equity of redemption. No defence was filed, and the plaintiff obtained judgment, with a reference to the Master to take the accounts.

The assignee of a subsequent incumbrancer appealed against certain items which were allowed the plaintiff on taking his account.

The first item objected to was a bonus of $200 to the plaintiff for indorsing the note; it was argued that by the statement of claim the conveyances were alleged to be an indemnity and security for the $2,500 the plaintiff was called upon to pay, making no mention of the bonus, and so that could not be charged or allowed. But the plaintiff was not claiming the bonus as a charge on the land, or as still due to him; it had been paid.

The note fell due in January, 1895, and the plaintiff, having to pay it, took possession of part of the land and employed the defendant to work it for him. The accounts showed a balance realized from the crop of $700, which was applied towards the defendant's indebtedness of $2,700, and a new note for $2,000 taken; *i.e.* the bonus of $200 was paid, and $500 applied on the debt. The accounts showed that this $200 was retained and applied to the bonus on the 10th October, 1895, three months before the registration of the judgment on which the assignee made her claim, and before she could claim to have any lien or charge on the land.

Held, that to strike out the bonus now would simply be to make the plaintiff repay money he had already received.

The bonus having been already paid brought the case within *Potter* v. *Edwards*, 26 L. J. Ch. 468, and *Mainland* v. *Upjohn*, 41

Ch. D. 126, and distinguished it from *James* v. *Kerr*, 40 Ch. D. 449, *Field* v. *Hopkins*, 44 Ch. D. 524, and *Eyre* v. *Wynn-Mackenzie*, [1894] 1 Ch. 218.

Culver, Q.C., for the appellant.

Howell, Q.C., and *D. A. Macdonald*, for the plaintiff.

[DUBUC, J., 11TH MARCH, 1898.

DAY v. RUTLEDGE.

Mortgage—Purchase of land at tax sale by mortgagor's wife—Fraudulent schemes—Foreclosure—Liability of assignee of purchaser at tax sale.

Suit to enforce a mortgage by foreclosure.

On the 19th May, 1888, O. G. Rutledge executed in favour of the plaintiff a mortgage on land in Ontario to secure $3,000, in which Hattie Rutledge, wife of O. G. Rutledge, joined to bar her dower. On the same day O. G. Rutledge executed in favour of the same mortgagee another mortgage for the same amount on land in Manitoba as collateral security for payment of the first mentioned mortgage. Rutledge and his wife went from Ontario to Manitoba, to reside on the land there, in March, 1889, and had resided there continuously ever since.

On the 16th May, 1893, the lands were sold by the municipality of Turtle Mountain for arrears of taxes, and purchased by Mrs. Rutledge, when the tax sale certificate was handed to her.

In the summer of the same year Mrs. Rutledge wrote to the plaintiff in Ontario about the mortgage, as a result of which David Purdy, brother of the plaintiff, came from Ontario to see about it, and stayed two weeks in Rutledge's house. As the result of the arrangement made, another mortgage was executed by O. G. Rutledge and his wife in favour of the plaintiff on the same property, dated the 10th September, 1893, to secure $2,635. Mrs. Rutledge stated that the mortgage was given as a substitute for the previous one.

The facts that the land had been sold for taxes, that Mrs. Rutledge had purchased it, and had the tax sale certificate in the house, were never mentioned to Purdy while he was there, either by Rutledge or his wife.

At the tax sale, at the request of Mrs. Rutledge, one McCubbin purchased for her, advanced the money, $48.61, to pay the amount of the taxes due, took the tax sale certificate in her name, and handed it to her. On the 18th December, 1893, she assigned the certificate to McCubbin, and on the 8th May, 1895, it was assigned by McCubbin to the defendant Lawlor.

On the 17th May, 1895, a tax sale deed was issued by the municipality in favour of Lawlor.

Since 1895 the land had been leased by Lawlor to Noble Rutledge, a cousin of O. G. Rutledge, who lived with the Rutledges, and the land had been cultivated by them in 1895, 1896, and 1897, just as before, without any apparent change.

This action was brought against O. G. Rutledge, T. J. Lawlor, and Hattie Rutledge, for foreclosure, and to have it declared that Lawlor held the land in trust for Rutledge and his wife.

Held, that it should be declared that Lawlor held the lands in trust for O. G. Rutledge and his wife, and, unless the amount due under the mortgage should be paid within the usual time, there should be a foreclosure of the equity of redemption.

All moneys paid by McCubbin or Lawlor, either for tax sale purchase money or for taxes, with interest, should be a first lien on the lands in favour of Lawlor. General costs of the suit o the plaintiff; the defendants to have costs of issues on which the plaintiff failed.

When Purdy was at Rutledge's house and they had a new mortgage substituted for the first one, they never mentioned to him that the land had been sold for arrears of taxes and had been purchased by Mrs. Rutledge. It was a dishonest act on their part to conceal it from the agent of the mortgagee, who would have been in a position to redeem the land, and would not have allowed a property worth from $1,200 to $1,500 to be sacrificed for $48.61 of overdue taxes. It was a scheme of Rutledge and his wife to get rid of the mortgage without paying it.

A mortgagor who has a duty to pay the taxes cannot, by neglect of such duty, purchase at a tax sale and acquire a valid title which would defeat the claims of the mortgagee.

Lawlor, the assignee of the tax sale certificate, was in no better position than Mrs. Rutledge, the assignor; he admitted he

knew there was a mortgage on the land; he must be held to have been aware of the infirmities or disabilities which attached to the certificate, and Lawlor's title to the lands in question should not be allowed to defeat the plaintiff's rights under the mortgage.

Culver, Q.C., and *Mulock*, Q.C., for the plaintiff.

Ewart, Q.C., and *Wilson*, for the defendants.

RITZ v. SCHMIDT.

Judgment by default—Application to set aside—Insufficient service—Leave to defend notwithstanding judgment.

Motion by the defendant Frose to set aside the judgment recovered by the plaintiffs against him by default, the writ of *hab. fac. pos.* issued thereon, the proceedings and seizure thereunder, also a vesting order made in favour of the plaintiffs, an order for sale, and other processes taken, and that the plaintiffs be ordered to deliver up to the defendant possession of the land, on the ground that he was not properly served with any statement of claim, order, notice of motion, warrant, or other process in the action, nor were the same ever in any manner brought to his knowledge, and on other grounds stated.

The defendant Schmidt did not move against the judgment.

The affidavit of service made by the bailiff stated that he personally served the defendant Frose with a true copy of the statement of claim by delivering the same to and leaving the same with him at his house, but that the defendant refused to accept the same, and the deponent left it at his house on the section of land therein described. The affidavit of service on Schmidt was in the same terms. Both Frose and Schmidt swore that the first they knew of the action was when the sheriff went there with the writ of possession. There was in the affidavit of service what was required by the Queen's Bench Act, and according to form 27, to make it a good affidavit of service; that was the printed part of the blank form used; but, by what was added in handwriting to explain how the service was actually effected, taken in connection with the sworn statement of the defendants that no such proceedings ever came to their knowledge, and with the fact that the defendants were Mennonites, not conversant with the English language, it must be held

that there was no personal service sufficient to allow judgment to be signed by default.

If the defendant had been informed of the nature of the process, and it had been thrown down, that would be sufficient: *Thompson* v. *Pheney*, 1 Dowl. 441. Such was not done in this case; there was nothing to show that the defendant was informed of the nature of the process intended to be served on him.

Any defence on the merits had not been convincingly shown; for that reason the judgment and other proceedings should not be set aside until it had been ascertained whether the defendant had really a good defence on the merits. As was done in *O'Sullivan* v. *Murphy*, 78 L. T. 213, the defendant should be allowed to defend the action by filing a statement of defence within fifteen days, so that the action would be at issue and might be tried in the usual course.

Costs of the application reserved until after the action had been disposed of.

Phippen, for the plaintiff.

Wilson, for the defendants.

CASE v. BARTLETT.

Mortgage—Unregistered agreement for—Declaration of lien—Registered judgments—Priorities.

An appeal from a Master's report. The action was to enforce an agreement made by the defendant to give a mortgage on his farm for machinery supplied. An order was made directing a reference to the Master. He found that the Imperial Bank and one Byers had obtained judgments against the defendant and registered the same subsequently to the agreement made with the plaintiffs, which was not registered. The Master made the bank and Byers parties as subsequent incumbrancers, and they appealed from the report, contending that their registered judgments should take priority over the plaintiffs' unregistered agreement.

Held, that the Master was right in making the judgment creditors subsequent incumbrancers, and the appeal should be dismissed with costs.

A registered judgment only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and, therefore, it does not displace the interest of a previous equitable mortgagee.

Wickham v. *New Brunswick R. W. Co.*, L. R. 1 P. C. 64; *Whitworth* v. *Gaugain*, 3 Ha. 415; *Eyre* v. *McDowell*, 9 H. L. C. 618, followed.

Howell, Q.C., and *Mathers*, for the appellants.

Mulock, Q.C., for the plaintiffs.

[KILLAM, J., 15TH MARCH, 1898.

WATSON v. DANDY.

Referee in Chambers—Jurisdiction of—Queen's Bench Act, 1895—Rules 26, 61, 804—Order for sale of land.

An appeal from an order of the Referee in Chambers. The main question was as to the jurisdiction of the Referee to make an order for the sale of land under Rule 804, which gives the authority to the Court or a Judge in Chambers. By s. 61 of the Queen's Bench Act, 1895, the Judges are empowered to make Rules, *inter alia*, for empowering the Referee in Chambers to exercise the jurisdiction "now or hereafter" exercised by a Judge in Chambers, with certain specified exceptions. Rule 26 empowers the Referee "to do such things . . . and exercise all such authority and jurisdiction as . . . are now done . . . or exercised by him, or by any Judge of the Court sitting in Chambers," with certain specified exceptions.

Prior to the Act, a Judge in Chambers had no power to make such an order, but the contention of the plaintiff was that the word "now" in Rule 26 made that Rule extend to the power and jurisdiction which were for the first time conferred by the Act and the accompanying Rules.

Held, that the Referee had no jurisdiction to make the order. That the Rule applied only to the powers, authority, and jurisdiction which, at the time of the coming into force of the Act and Rules, but independently thereof, a Judge in Chambers had. It was only *after* the Act and Rules came into force that a

Judge could do the things and exercise the authority and jurisdiction that he was then for the first time empowered to do and exercise.

Appeal allowed, order of the Referee discharged, and original application dismissed; the plaintiff to pay the costs of the appeal, to be set off against the judgment. No costs of the application to the Referee allowed.

Clark, for the plaintiff.

Hull, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[The Justices in Banc, 11th June, 1897, 11th December, 1897.

In re FORBES.

Advocate—Restoration to roll—Jurisdiction of Court—Previous application—Re-enrolment—Forum — Ordinance No. 4, 1897—Power to restore—Exercise—Discretion.

An application to reinstate Mr. Forbes on the roll of advocates of the North-West Territories having been refused on the 14th December, 1896, for the reasons given in 17 Occ. N. 802, a fresh application was made on his behalf in the June Term, 1897, for a rule or order of the Court in banc directing that the order made on the 5th June, 1896, striking him off the roll of advocates, be rescinded or set aside, or for an order that he be reinstated upon the roll, or be enrolled as such, or for such other order as should seem meet.

In the affidavit of the applicant filed in support of the application it was stated that he had paid all moneys due by him under the order which formed the subject-matter of the application to strike him off the roll, and, so far as he was aware, he held no trust moneys of any person whatever. There was also

a joint affidavit of two advocates stating that they had known the applicant for some years, and that during the last six months he had been of good character and conduct.

T. C. Johnstone, for the applicant.

W. C. Hamilton, Q.C., for F. J. Calvert, the person who had obtained the order of the 5th June, 1896, contended that the Court had no jurisdiction to entertain the application.

The judgment of the Court was delivered by

RICHARDSON, J.—No grounds are now before us which would lead this Court to reverse its previous decision. It is true that the wording of the motion goes further now than previously; the Court is asked to rescind the order striking off, as also to direct Mr. Forbes's re-enrolment, as alternatives to reinstatement, or to make any further order which may seem meet. But, as at present advised, the powers conferred by the Legislature being expressly limited to one single power in such cases as Mr. Forbes's, we must hold that the present application is practically for the same relief as before, except as to re-enrolment, and must be refused.

As regards re-enrolment, the Court points out that by the Ordinance respecting the legal profession one, and only one, method of procedure is defined by which re-enrolment can be effected, *i.e.*, through a single Judge, and, even if it could be held that this Court could exercise these powers, the material required by the Ordinance for enrolment is not before us.

It is open to serious doubt in the minds of the members of this Court whether the Legislature could have intended, when framing the Ordinance, to confer on a Judge the power of re-enrolment after an order striking off had been made.

The application must, therefore, on all grounds, be refused.

In the December Term, 1897, Mr. Forbes again applied for an order restoring him to the roll.

The application was made under the provisions of Ordinance No. 4 of 1897, which came into force on the 8th December, 1897.

Notice of the application was given to the persons pecuniarily interested in the application which resulted in the order strik-

ing the applicant's name off the roll, and to the official named in the Ordinance.

The application was supported by proof that Mr. Forbes had discharged the liability involved in the application to strike off; that there were no other similar claims against him extant; and that his conduct and character had since been unblemished.

T. C. Johnstone, for the applicant.

W. C. Hamilton, Q.C., for F. J. Calvert, and for the Attorney-General, did not oppose the application, but left the matter entirely to the discretion of the Court.

The judgment of the Court was delivered by

RICHARDSON, J.—Under the circumstances disclosed, and in view of the fact, also, that Mr. Forbes has been seriously punished by being deprived of following his profession for eighteen months, this Court is warranted in granting the present application; and an order is to issue that Mr. Forbes's name is to be restored to the roll.

[9TH DECEMBER, 1897.

MORTON v. BANK OF MONTREAL.

Security for costs—Appeal—Failure to comply with terms of order—Dismissal of appeal—"Forthwith," meaning of.

On the 8th June, 1897, an order was made by RICHARDSON, J., requiring the plaintiff to forthwith pay into Court $100 as security for the defendants' costs of the plaintiff's appeal to this Court from the judgment of the trial Judge dismissing the action, and directing that in default of such payment the plaintiff's appeal should not be heard. See 17 Occ. N. 308.

On the first day of the December Term, 1897, no proceedings having been taken in the meantime, the plaintiff moved for an order allowing him to inscribe his appeal upon payment of $100 into Court.

The defendants moved for an order dismissing the plaintiff's appeal with costs.

Secord, Q.C., for the plaintiff.

Ford Jones, for the defendants.

The judgment of the Court was delivered by

ROULEAU, J.—The right of the plaintiff to be heard by this Court was dependent on his giving security forthwith, and as soon as default in giving security was made, his right of appeal was gone: *Harris* v. *Fleming*, 30 W. R. 555.

At all events, it seems to me that, before the plaintiff asks for an indulgence from this Court, he should be in a position to show good reasons why he did not comply before this time with the terms of the order. There are numerous authorities to show that where an order has been made for the appellant to give security for the costs of an appeal, if he does not give it within a reasonable time, the Court will dismiss the appeal without giving further time, unless there are extenuating circumstances: *Washburn and Moen Manufacturing Co.* v. *Patterson*, 29 Ch. D. 48; *Vale* v. *Oppert*, 5 Ch. D. 633. *Judd* v. *Green*, 4 Ch. D. 784, also says that the delay must be explained.

There was no proof or material upon which this motion was based. The only thing this Court had was the verbal explanation of the plaintiff's advocate, which is no evidence or proof that the plaintiff deserves the indulgence of this Court.

By the terms of the order the plaintiff was to give security "forthwith." According to the best authorities, the word "forthwith" in matters of procedure means within twenty-four hours, and when a statute enacts that an act is to be done "forthwith," it means that the act is to be done within a reasonable time. In *Burgess* v. *Boetefeur*, 7 M. & G. at p. 494, it was decided that the word "forthwith" means with all reasonable celerity. No doubt the plaintiff cannot contend for a moment that he used reasonable celerity. I may add that he ignored the order till five days before the term of this Court. Not only had he days to consider his position, but he took months. He cannot possibly claim to be within the range of the meaning of the word "forthwith."

I am therefore of the opinion that the plaintiff's motion should be dismissed with costs.

And, as a consequence of this judgment, the defendants' motion, asking that the plaintiff's appeal be dismissed with costs, is granted.

[11TH DECEMBER, 1897.

In re ADVOCATES.

Advocates—Motion to strike names off roll—Non-payment of moneys collected—Proof of non-payment—Grounds of application—Omission to state in summons—Special provisions of Ordinance respecting legal profession—Locus standi of applicants—Want of privity—Employment of advocates as agents—Misconduct of one partner—Liability of the other to disciplinary jurisdiction—Punishment—Procedure—Order for payment over—Locus pœnitentiæ.

Summons granted by RICHARDSON, J., to Mowat Brothers, under s. 15 of the Ordinance respecting the legal profession, No. 9 of 1895, as amended by No. 5 of 1896, s. 2, to strike H. & B. off the roll of advocates, or to suspend them from practising, under the following circumstances:

The applicants having obtained a judgment for the recovery of money against one Steele, their advocates at Regina wrote to H. & B., who practised in partnership at Macleod, requesting them to place an execution against Steele in the sheriff's hands. H. & B. made an arrangement with Steele to settle the applicants' claim for $400, which amount Steele paid to H. H. & B. never informed the advocates at Regina that H. had received the money, although they had informed them of the arrangement for a settlement, and the fact of the payment was learnt through another source. After repeated letters to H. & B., asking for payment, to which no attention was paid, the applicants obtained the summons, which was referred by RICHARDSON, J., to the Court.

Secord, Q.C., for the applicants.

Norman Mackenzie and *H. A. Robson*, for the advocates.

The judgment of the Court was delivered by

WETMORE, J.—It is contended that the moneys might have been paid to Mowat Brothers, and there is no evidence that they were not so paid. There is nothing in this objection. Secord and Balfour were the advocates on the record for Mowat Brothers in the suit against Steele. The instructions to H. & B. came through them, and all the correspondence with H. & B. was from them. If the moneys were paid by H. & B., the advocates on the record would be the natural and proper persons to receive it, and the fact that such payment was not made to them was

sufficient to establish *prima facie* that it was not made to any person entitled to receive it.

It was also objected that the summons does not state the grounds on which the application was made, and s. 471 of the Judicature Ordinance was referred to. This is not an application to the Court to exercise its summary jurisdiction over its officers according to the ordinary practice. It is a special application under s. 15 of Ordinance No. 9 of 1895, as amended, which contains special provisions as to what a summons issued thereunder shall contain. The summons in this case complied with such provisions, and that is quite sufficient.

It was likewise objected that Mowat Brothers have no *locus standi* to make the application, as there was no privity between them and H. & B. There is nothing in this. *Ex p. Edwards*, 7 Q. B. D. 155, is decisive upon the point.

It was further urged that there was nothing to show that the money was not paid since the case was before RICHARDSON, J. In the absence of evidence to the contrary, it will be assumed that the condition of affairs remains the same as when the learned Judge made his report. If the advocates have since paid, and wish to get the benefit of having done so, it is upon them to prove it.

H. has, beyond all question, rendered himself liable to the punishment provided by s. 16 of Ordinance No. 9 of 1895, as amended by s. 8 of Ordinance No. 5 of 1896. He has deliberately made default in payment of the $400, which he unquestionably received. . . . I believe that, as a matter of fact, he has misappropriated the money to his own use.

B.'s position is, however, very materially different. The first sum paid by Steele, $150, was undoubtedly paid while the partnership between H. & B. existed, and came to the knowledge of B., but was paid to H., and never actually came into the hands of B. The other portion of the money, $250, was paid to H. after the partnership was dissolved, on the 1st June, 1897. Before B. left Macleod, on the 3rd July, H. informed him that he had the moneys in question collected, and had the amount in hand to remit, less his costs of collection, and B. left Macleod fully expecting that the moneys would be remitted in due course. There has been no personal misconduct on B.'s part; and, to justify an order to strike a solicitor off the roll,

there must be personal misconduct; it is not enough to show that his partner has been guilty of fraudulent conduct from which a constructive liability to pay money may perhaps arise: *Re McCaughey*, 3 O. R. 425; *Re Ross*, 16 P. R. 482. I think that the principle laid down in these cases is sound, and I am prepared to follow them. I also refer to *Ex p. Flood*, 28 N. B. Reps. 86, as bearing on the question, although I do not wish to be considered as going as far as that case does. This application, therefore, so far as B. is concerned, will be dismissed, but, under the circumstances, without costs.

Were I to use my own unaided judgment, I should be inclined to order H.'s name to be struck off the roll forthwith. My learned brethren are all of opinion that such extreme measures are not at present necessary, and I must admit that their views are borne out by the practice in Ontario under the Act in force there: see *Re Bridgman*, 16 P. R. 232. Under these circumstances, I concur in the views of my learned brethren.

On consultation with my brethren, I am at liberty to state, with a view of settling the practice, where an application is made to strike the name of an advocate off the roll for non-payment of moneys received by him as an advocate, that, upon hearing the application, if the Court is of opinion that the advocate is liable to have an order made against him to pay over the moneys, it will make an order that he pay such moneys to the Registrar of this Court on or before a day to be named in the order, and that if such moneys be not paid pursuant to its requirements, the name of the advocate be struck off the roll, and that upon default being made under such order, notice shall be given to the advocate that on a day to be named in the notice application will be made to the Court for an order to issue to the custodian of the roll to strike the name off the roll, and on the day named, no cause being shown to the contrary, an order will be issued accordingly: *Re Bridgman*, *supra*. The Court will, however, reserve to itself the right to depart from such practice under special circumstances and in very aggravated cases.

The order in this case will be that the applicants do, within three weeks, at a time to be appointed by the Registrar, bring in their bill of costs of this application, both before Richardson, J., and this Court, to be taxed by the Registrar, and that H. do

within three weeks, at a time to be appointed, bring in his bill of costs, expenses, and disbursements in respect to the work and services he performed in and about the claim of the applicants against Steele, under his employment by the advocates for the applicants, to be taxed by the Registrar, who is to tax such bills as may be brought in, and that H. do, on or before the 22nd January next, pay to the Registrar the sum of $400 and the costs taxed to the applicants, less the amount taxed to him, if any, and that, in default of his so paying the moneys, his name be struck off the roll.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

[Richardson, J., 11th March, 1898.

GLENN v. SCOTT.

Mortgage—Indemnity—Purchase subject to mortgage—Implied covenant—Assignment of right to payment.

Last and Vian mortgaged lot 1 in block 28, Indian Head, to the plaintiff to secure payment of $8,300. The title to the land was under the Real Property Act, R. S. C. c. 51. Last and Vian sold to Thompson, and Thompson sold to James Scott, deceased, of whose estate the defendants were the administrators. The transfer from Thompson to Scott was in consideration of the sum of $8,300, out of which Scott was to pay the plaintiff's mortgage.

Thompson assigned to the plaintiff all his right against the defendants in respect of these transactions. On this assignment the plaintiff claimed payment of his mortgage from the defendants: (1) as for unpaid balance of purchase money; (2) on Scott's implied covenant, under s. 69 of the Territories Real Property Act, to pay mortgage moneys.

Held, that the plaintiff was entitled to recover.

See *Campbell* v. *Morrison*, 24 A. R. 224, 17 Occ. N. 115.

Hugh Robson, for the plaintiff.

W. C. Hamilton, Q.C., for the defendants.

IN CHAMBERS.

[RICHARDSON, J., 11TH MARCH, 1898.

DOIDGE v. TOWN OF REGINA.

Discovery—Order for—Default under—Motion to dismiss action—Failure to indorse notice on order—Judicature Ordinance, s. 311.

The defendants, on the 10th January, 1898, obtained an order for discovery, and the plaintiffs failing to comply with its terms, the defendants on the 22nd January obtained a summons, under s. 184 of the Judicature Ordinance (English Marginal Rule 363), for the plaintiffs to show cause why their action should not be dismissed for non-compliance with the terms of the order for discovery. The order for discovery was not indorsed with notice under s. 311 of the Judicature Ordinance (English Marginal Rule 578).

Ford Jones, for the plaintiffs, showed cause, and contended that the application must fail for want of such notice, citing *Hampden* v. *Wallis*, 26 Ch. D. 746.

Norman Mackenzie, for the defendants, in reply, contended that, there being two distinct modes of procedure for non-compliance with the order, the indorsement of the notice was only necessary where attachment was sought: *Farden* v. *Richter*, 23 Q. B. D., *per* Huddlestone, B., at p. 129.

Held, that the order should have been indorsed under Rule 311, and the summons was discharged with costs.

BRITISH COLUMBIA.

In the Supreme Court.

IN CHAMBERS.

[BOLE, LOC. J., 19TH MARCH, 1898.

In re OCKERMAN.

Criminal law—Extradition—Embezzlement—Proof of offence—Depositions—Hearsay—Absence of particulars—Admissions of accused—Evidence of—Foundation for.

Application on behalf of the State of Oregon for a warrant of committal under the Extradition Acts.

The accused was secretary of the Benevolent Order of Elks at Portland, Oregon, and it was charged that in that capacity he, within the period of about five years, before December, 1897, embezzled some $1,588, the property of the society.

The evidence for the prosecution consisted of two depositions and certain alleged admissions.

The deposition of one Bingham was that, having examined the books kept by the accused, he was satisfied that between 1892 and the date of such examination there appeared to be a deficiency of over $1,500, and that the sum had not been paid to the treasurer of the society, nor to any other officer of the company. He did not give any ground or reason for his statement, nor even allege that he received any information from the treasurer on the subject; he gave no items nor any information with respect to dates; and no copy of the account was attached or referred to in the deposition.

The deposition of the other witness was even more unsatisfactory; nor had he any personal knowledge of the alleged offence.

The books of the society were not produced, nor was their absence accounted for.

Held, that, even assuming that Bingham's book-keeping was not at fault, though he gave no opportunity of checking it, the fact remained that he was relying on hearsay evidence, and as he did not condescend to particulars, it could not be said that his evidence was satisfactory, and that of the other witness being still more unsatisfactory, a case for a committal was not made upon the depositions.

In re Lewis, 6 P. R. at p. 287, *In re Parker*, 9 P. R. at p. 335, and Clarke on Extradition, p. 186, referred to.

Held, also, that the alleged admissions, as deposed to by one Connor, did not supply the place of properly drawn depositions, as they were of a vague and uncertain character, and not clearly shown to be unequivocal admissions of the offence charged. By s. 592 of the Criminal Code, a prosecutor is allowed to give in evidence admissions, confessions, or statements, made at any time by the persons accused, which by law would be admitted against him. Connor's evidence, although in terms denying that any inducement or threat was held out,

is with respect to the conversation between himself and the accused of a fragmentary and incomplete kind, and while there is no reason to suppose the evidence is not perfectly true, as far as it goes, it is quite possible that Connor may have forgotten much of what was said on that occasion; and, while the accused has the right to insist that the whole of the conversation in which the alleged admission was made shall be given in evidence, as said in Roscoe's N. P., 11th ed. p. 51, it must also be borne in mind that to make a confession by a prisoner admissible, it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had been removed; *Regina* v. *Thompson*, [1893] 2 Q. B. 12: and this not having been satisfactorily proved, a warrant of committal could not be based on this part of the evidence.

Motion refused and prisoner discharged.

Bowser, for the applicants.

Wilson, Q.C., and *Senkler*, for the accused.

Exchequer Court of Canada.

[BURBIDGE, J., 17TH JANUARY, 1898.

WOODBURN v. THE QUEEN.

Appeal—Extension of time—Order of reference—Amendment of—Laches.

An order of reference had been settled in such a way as to omit to reserve certain questions which the Court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement, and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed, and the referee's report filed. After final judgment in the action, the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal, an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended.

Under the circumstances, the Court extended the time to appeal, but refused to amend the order of reference as settled.

E. L. Newcombe, Q.C., for the Crown.

R. V. Sinclair, for the suppliant.

[24TH JANUARY, 1898.

AUER INCANDESCENT LIGHT MFG. CO. v. DRESCHEL.

Patent of invention—Canadian patent—Foreign patent—Expiration of—Effect of.

The expression "any foreign patent" occurring in the concluding clause of s. 8 of the Patent Act, "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires," must be limited to foreign patents in existence when the Canadian patent was granted.

C. A. Duclos, for the plaintiffs.

J. E. Martin, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [1ST APRIL, 1898.

TATE v. NATURAL GAS AND OIL CO. OF ONTARIO.

Parties—Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract.

A motion by the defendants and the Ontario Natural Gas Company for leave to appeal from the order of a Divisional Court, *ante* 115, allowing the plaintiff to add the latter company and an individual as parties defendant, was refused, the Court agreeing with the opinion of MEREDITH, C.J., in the Divisional Court.

W. R. Riddell, for the applicants.

Aylesworth, Q.C., for the plaintiff.

ROSE, J.] [18TH FEBRUARY, 1898.

In re GROSS.

Criminal law—Extradition—Offence referred to by wrong name—Theft—Larceny.

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and the law of the country demanding the extradition of the accused person, extradition will lie, though in the proceedings therefor the offence is referred to by a wrong name.

Larceny is, by the Ashburton Treaty, the Convention of 1889, and the Extradition Act, specified as a crime for which extradition to the United States will lie; but larceny is not, by

that name, recognized as a crime by the Criminal Code, 1892, the terms there used to describe the same offence being "theft" or "stealing."

Held, affirming the decision of ROSE, J., that where there was evidence of the commission of the crime of theft, the prisoner should be held for extradition, although in the proceedings for extradition the offence was described as larceny.

J. F. Faulds, for the prisoner.

J. Curry, for the prosecutors.

ROBERTSON, J.] [15TH MARCH, 1898.

DWYRE v. CITY OF OTTAWA.

Injunction—Interlocutory order—Balance of convenience—Municipal corporations—By-laws regulating procedure.

A by-law of a municipal corporation, passed under s. 283 of the Consolidated Municipal Act for the purpose of regulating procedure, requiring work exceeding $200 in value to be done by contract after tenders had been called for, was, on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover and include the construction during the year of any similar pavement on other streets at the same prices and terms. In pursuance of this stipulation the contractors entered into other contracts with the corporation, and proceeded with the work by opening up other streets and otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer :—

Held, that as the applicant's legal right was not clear, and, as serious loss and public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.

Decision of ROBERTSON, J., reversed.

W. Nesbitt and *H. E. Rose*, for the appellants.

McCarthy, Q.C., and *D. L. McCarthy*, for the respondent.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 14TH FEBRUARY, 1898.

CALLAGHAN v. HOWELL.

Will—Legacy—Devise of land—Payment of legacy out of rents and profits—Charge—Arrears—Action to recover—Limitation of actions—Receiver.

A testator, by his will, after a bequest to the plaintiff, amongst others, made a devise to his daughter M. of "my two farms," describing them, and all the rest of his property of whatsoever kind, and, in case of her marriage, to her "sole and separate use," and desired his executors to pay the legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered, but the daughter took possession of the whole estate, and received the rents and profits of the farms. She subsequently mortgaged the farms, and they were sold by a first mortgagee, under his power of sale, and, after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee.

Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the farms, the provision in the will therefore being clear, and was not affected by the subsequent words, or as to the executors "should seem best;" but that her right to arrears of interest must be limited to six years; that the fact that sufficient annual produce of the farms had been received to pay the legacy, was no answer to the plaintiff's claim, for it could not be set up by the daughter, by reason of her possession and receipt, and her grantees and mortgagees could be in no better position; that, if necessary, a receiver of such annual produce should be appointed; that the balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that, after the payment thereof, it could be paid out to the subsequent mortgagee.

W. H. Blake, for the defendant Thompson.

Clute, Q.C., for the plaintiff.

S. Masson, for the defendant Howell.

The other defendants were not represented.

[4TH APRIL, 1898.

CAMPBELL v. FARLEY.

Parties—Claims against partnership—Action against surviving partner—Third party notice—Indemnity or relief over—Administratrix of deceased partner—Concurrent administration proceedings—Claim upon collateral security.

An appeal by the defendant Farley from the order of STREET, J., *ante* 141, setting aside an order permitting the appellant to serve a third party notice upon Jennie MacDonald, was dismissed, the Court agreeing with the opinion of STREET, J.

Tremeear, for the defendant Farley.

W. E. Middleton, for Jennie MacDonald.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET J., 17TH FEBRUARY, 1898.

SMITH v. SMITH.

Parent and child—Agreement—Maintenance of parent—Consideration—Promise to bestow farm on child—Definite contract—Evidence—Change of intention.

When a son seeks to enforce an agreement that if he remains with his father and works the latter's farm, and provides for his declining years, the father will bestow the farm on him, Courts will require that the agreement be established by the clearest evidence, and that a certain and definite contract for a valuable consideration be proved, or the parent will be entitled to change his views and the disposition of the property, in case of his own altered circumstances, or want of filial conduct on the part of the child.

Judgment of ROSE, J., reversed.

G. W. Wells, Q.C., for the plaintiff.

W. R. Riddell and *W. E. Kelly*, for the defendant.

[5TH APRIL, 1898.

CUNNINGTON v. PETERSON.

Promissory note—Material alteration—Unauthorized addition of name as maker—Intent—Presumption—Holder in due course—Alteration not apparent—Bills of Exchange Act, 1890, s. 63.

An appeal by the defendants from the judgment of the County Court of Waterloo in favour of the plaintiff in an action upon a joint and several promissory note, purporting to be made by all the defendants, payable to Dygert Brothers, and by them indorsed to the plaintiff, who became "the holder thereof in due course," within the Bills of Exchange Act, 1890.

The defendants Good and Hahn did not defend; the defendant Nicholous Dietrict denied that he made the note; and the other defendants set up, amongst other things, that R. J. Dygert, one of the firm of Dygert Brothers, materially changed and altered the note by forging the name of the defendant Dietrict thereto, and the same was thereby avoided.

The plaintiff did not attempt at the trial to prove the signature of Dietrict, and was nonsuited as to him; Dietrict was then called as a witness on behalf of the other defendants, and denied that he signed the note or authorized anyone to sign it for him. There was no evidenee that R. J. Dygert forged his name, nor as to how his name came to be signed, nor when; but it appeared that it was signed to the note when the plaintiff became the holder.

The only question argued was whether the plaintiff could recover against the other makers of the note, the name of the defendant Dietrict being there without his authority.

Held, that, as in this case the name of Dietrict was signed to the note during the completion of it, after five of the defendants had signed it, and before other two ot the defendants had signed, and before it was issued, and the plaintiff did not sign it, and it was not fair from the evidence to conclude that either of the payees did it, and the inference from the evidence was that if the defendant Dietrict neither signed it nor authorized the signing of it, some person signed it, not with intent to defraud, but believing that he had the authority to sign it for Dietrict, there was considerable doubt whether this was a material alteration which avoided the note, or an alteration at all.

Reid v. *Humphrey*, 6 A. R. 403, distinguished.

Doe Lewis v. *Kinghorn*, 4 B. & Ald. 674; *Pigot's case*, 11 Coke 26 *b*; *Lowe v. Fox*, 12 App. Cas. at p. 217, referred to.

But it was unnecessary to determine whether it was an alteration or a material alteration, for the plaintiff being the holder of the note in due course, and the alteration not being apparent, he might avail himself of it as if it had not been altered, under the proviso to s. 63 of the Bills of Exchange Act, 1890, which proviso extends to an alteration by the addition of a name as maker to a note, for it was passed for the protection of holders in due course, and the generality of its terms could not be restricted.

The dictum of Denman, J., in *Leeds Bank* v. *Walker*, 11 Q. B. D. at p. 90, as to the meaning of the word "apparent" in the English enactment corresponding to s. 63 above, was not necessary for the decision of the case, and would do away altogether with the benefit to the holder in due course designed by the proviso, and was not followed in *Scholfield* v. *Londesborough*, [1894] 2 Q. B. 660; [1895] 1 Q. B. 536; [1896] A. C. 514.

Appeal dismissed with costs.

W. M. Douglas, for the defendants.

E. G. Graham, for the plaintiff.

[7TH APRIL, 1898.

ALDERICH v. HUMPHREY.

Trespass—Constable—Warrant—Arrest in wrong county—Good faith—Protection—R. S. O. 1887 c. 73—Notice of action—Insufficiency of—Pleading—"Not guilty by statute"—Amendment.

Motion by the defendant Young to set aside the verdict and judgment for the plaintiff against him for $75 and County Court costs in an action for trespass and false arrest and imprisonment, tried before ROBERTSON, J., and a jury, at Hamilton.

The defendant Young was a constable, and arrested the plaintiff professedly under a warrant of commitment issued pursuant to a conviction of the plaintiff by the defendant Humphrey, a justice of the peace for the county of Haldimand, for an assault.

Held, that the defendant Young was acting in good faith in making the arrest, and there was no evidence to the contrary; he showed the plaintiff the warrant and read it to him; he made the mistake, however, of executing it without first procuring the indorsement of it by a justice of the peace for the county of Wentworth, in which county the arrest was made, under the provisions of ss. 565 and 844 of the Criminal Code; but he was entitled to the protection of R. S. O. 1887 c. 73, and to notice of action: *Sinden* v. *Brown*, 17 A. R. 173; *McGuinness* v. *Dafoe*, 23 A. R. 704, and cases cited at p. 712; *Hughes* v. *Buckland*, 15 M. & W. 346.

Notice of action was given, but it was insufficient, for it stated that the arrest took place in the township of Ancaster, instead of in the township of Glanford: *Madden* v. *Shiner*, 2 U. C. R. 115; *Cronkite* v. *Somerville*, 3 U. C. R. 129; *Parkyn* v. *Staples*, 19 C. P. 240.

The defendant Young was not debarred from pleading "not guilty by statute" to the 8th paragraph of the statement of claim, which alleged the arrest in the county of Wentworth, in the face of 7 Jac. I. c. 5, and R. S. O. 1887 c. 73, and the pleadings must now be amended by allowing such plea to the 8th paragraph, or a plea of want of notice of action.

Order made with costs setting aside the verdict and judgment for the plaintiff against the defendant Young, and directing that judgment be entered dismissing the action with costs.

E. D. Armour, Q.C., for the defendant Young.

W. W. Osborne, for the plaintiff.

[BOYD, C., MEREDITH, J., 1ST MARCH, 1898.

HAIGHT v. HAMILTON STREET RAILWAY CO.

Street railways—Negligence—Injury to foot passenger—Evidence.

The plaintiff, a man over ninety years of age, lame, very infirm, and almost deaf and blind, while attempting to cross a street in a city, was run into by one of the defendants' electric cars, and injured. The plaintiff was walking at a snail's pace; his manner and actions, being strange, were observed, not only by persons some distance off, who, thinking he was in danger, attempted, unavailingly, to warn him, but also by the motorman,

who thought he might be drunk, and said he could have stopped the car before reaching the plaintiff, had he not thought the plaintiff saw the car and would have got out of the way, but that when he did attempt to stop, it was too late.

Held, that there was evidence of negligence to go to the jury.

Crerar, Q.C., and *P. D. Crerar*, for the defendants.

Lynch-Staunton, for the plaintiff.

[BOYD, C., 7TH APRIL, 1898.

BAKER v. STUART.

Dower—Widow's election—Devolution of Estates Act—Time—Ascertainment of rights—Construction of will.

An appeal by the defendant Margaret Stuart, the widow of James N. Stuart, from a certificate of the Master at Cornwall.

James N. Stuart died in August, 1896, and probate of his will was granted in November, 1896. An action to construe the will was begun in January, 1897, and judgment given in March declaring an intestacy as to lands, and that the widow was entitled to dower thereout, notwithstanding benefits received by her under the will: 28 O. R. 439, 17 Occ. N. 144. The Master was directed to sell the lands, if that was needed for the purpose of administration and distribution, and a sale was had under the judgment, in October, 1897. The widow filed a statutory deed of election to take a distributive share of the estate, in lieu of dower, on the 14th March, 1898, more than a year after the death.

The Master ruled that the widow could not elect because of the judgment declaring her right to dower, and in support of his ruling it was also contended that the right to elect should be exercised within a year from the death according to the Devolution of Estates Act, and that now it was too late for the widow to act under s. 4, s.-s. 2, of R. S. O. 1897 c. 127, as read with s. 13.

No question of title arose, because the lands had all been sold and the purchase money was in Court.

Held, that there was no reason why the widow might not effectively declare her election to take a distributive share of the proceeds of sale, instead of claiming dower, so long as the money

was in the hands of the Court. The Act required the husband, as to his curtesy, to elect within six months after his wife's death: s. 4, s.-s. 3: but no time limit was expressed as to the wife's election in s.-s. 2 of the same clause. That would leave it open to the widow to claim by election a distributive share, so long as the estate had not been divided on the footing of her having retained the right to dower. The rights of the beneficiaries and of the next of kin were not known or ascertained legally in this estate until the will was construed in March, 1897, and within a year from that time the widow made her statutory election, which disturbed the rights or shares of no one entitled to receive a distributive portion. The judgment construing the will was not meant to conclude the right of the widow to share on the footing of dowress; it was a declaration that upon the construction of the will she was entitled to dower, as well as the testamentary benefits bestowed upon her. Nor did the mere lapse of time operate under the statute, in the circumstances of this case, to bar her privilege under s. 4, s.-s. 2, of the Devolution of Estates Act.

Appeal allowed. Costs out of the estate.

E. D. Armour, Q.C., for the appellant.

J. H. Moss, for the respondents.

[12TH APRIL, 1898.

In re SCHOOL SECTION 16, TOWNSHIP OF HAMILTON.

Public schools—Alteration of boundaries of school sections—Division of section—Appeal to county council—Arbitration and award—Ultra vires—Change in law—54 V. c. 85, s. 82—Construction of.

Motion by the trustees of the school section to set aside an award made by the arbitrators appointed by the municipal council of the united counties of Northumberland and Durham to consider and decide upon an appeal to the council in regard to the boundaries of the school section.

Held, that the change made in the Public Schools Act by the amendment contained in s. 82 of 54 V. c. 85 has in some respects limited the right of appeal to the county council. Before the amendment the township council had power to pass by-laws (1) to alter the boundaries of a school section; (2) to

divide an existing section into two or more sections; (3) to unite portions of an existing section with another section or with any new section: R. S. O. 1887 c. 225, s. 81. By s. 82 of that Act, an appeal was given to the council against any by-law for the formation, division, union, or alteration of school section or sections and against the neglect or refusal of the township to form, divide, unite, or alter the boundaries of school sections. The change made by the Act of 1891 was that the latter appeal was limited to neglect or refusal to alter the boundaries of school section; and the question was whether the words "alteration of boundaries" were large enough to cover union and division. Giving words their fair meaning, and having regard to the particular grouping of words, the better and only intrepretation was that a limited meaning should be given to these words. What was sought in this case was the division of school section 16 into two equal parts, each of which was large enough to become a section by itself. The present law, carried on from 1891 into the consolidation of 1896, gave no appeal in such a case, and all proceedings thereafter, culminating in the majority award, fell to the ground as *ultra vires*.

Order made setting aside award without costs.

Clute, Q.C., and *F. D. Boggs*, for the applicants.

Masten, for the township corporation.

W. R. Riddell, for certain ratepayers.

[FERGUSON, J., 7TH APRIL, 1898.

KEEPER v. PHŒNIX INSURANCE COMPANY OF HARTFORD.

Fire insurance—Written contract by assured for sale of insured premises—Non-disclosure to insurers—Parol evidence to vary written contract—Verbal agreement that vendor should insure—Collateral contract—"Assigns"—Purchaser—Right of vendor to recover for loss by fire—Trustee for purchaser.

Action upon a fire insurance policy for $2,000, $1,700 upon one building, and $300 upon another. The policy was dated the 28th February, 1894. The fire took place on the 11th December, 1896. The undisputed amount of the loss was the whole $1,700 to one building, and $40 to the other. On the

25th July, 1893, the plaintiff had made a contract with one Cloy for the sale of the premises on which the insured buildings were, for $2,000, and Cloy had paid on account of the purchase money $800 before the obtaining of the policy, and afterwards some further sums, $1,800 in all having been paid before the fire. The plaintiff did not disclose to the defendants the fact of his having made this contract, and the defendants had no knowledge of it until the day before that of the fire.

The defendants pleaded that they were liable only for $700, which they had tendered before action and brought into Court.

The case was tried upon admissions, one being that two witnesses on the plaintiff's behalf would, if called, state under oath that at the time of the contract between the plaintiff and Cloy it was agreed between them that until the purchase money was fully paid the plaintiff would keep the property insured to the extent of $2,000, the defendants, however, objecting that such testimony would be inadmissible, in the face of the written agreement, which they contended was contradictory of such testimony.

Held, adopting the reasoning of the Supreme Court of Pennsylvania in *Parcell* v. *Grosser*, 1 Atl. R. 909, a case exactly in point, that the verbal contract was a collateral one, and the evidence therefore admissible.

Held, also, that it was not contradictory of the written document.

By the policy the defendants agreed to indemnify and make good unto the assured, his heirs or assigns, all such direct loss or damage, etc.

Held, that the words "heirs or assigns" meant heirs or assigns of the property, and that the purchaser fell within the meaning of the word "assigns."

Held, also, that the plaintiff, having had an interest in the property at the time the insurance was effected, and at the time of the fire, was entitled to recover upon the policy, and, in the circumstances, not only for the amount of his own actual loss, but to the extent of the whole loss by the fire, his recovery for the part over and above the amount of his own loss being a recovery as trustee for the purchaser.

H. H. Collier, for the plaintiff.

Aylesworth, Q.C., for the defendants.

[MacMahon, J., 29th January, 1898.

MACDONALD v. LAKE SIMCOE ICE AND COLD STORAGE COMPANY.

Navigation—Carriage of ice—Right to cut passage through harbour.

The cutting of a channel through the ice formed on a water lot in a harbour, to enable ice, cut outside of such water lot, to be conveyed to an ice-house on the shore of such harbour, is a use of the water lot for the purposes of navigation; and therefore the owner of such water lot, whose grant was subject to the rights of navigation, cannot interfere with such user.

W. Macdonald, for the plaintiff.

R. U. McPherson and *G. C. Campbell*, for the defendants.

[4th April, 1898.

WELLER v. CARNEW.

Landlord and tenant—Lease—Construction—Habendum—Subsequent proviso—Repugnancy.

Action to recover possession of certain premises in Belleville in occupation of the defendant.

By lease under seal the plaintiffs leased to the defendant and one Hyman the premises in question, *habendum* "to the lessees, their executors, administrators, and assigns, for the term of one year, to be computed from the 18th January, 1897." After the covenant for quiet enjoyment, the following clause was inserted: "And it is agreed between the parties hereto that either party may terminate this lease at the end of the year on giving three months' written notice prior thereto." The lease was for one year, ending on the 18th January, 1898.

Held, that the above clause was clearly repugnant to the *habendum* and must be rejected: Sheppard's Touchstone, p. 88: Elphinstone's Interpretation of Deeds, p. 91: Bouvier's L. D. tit. "Repugnancy"; *Cope* v. *Cope*, 15 Sim. 126.

Judgment for the plaintiffs for possession and $15 arrears of rent, with costs.

Northrup, for the plaintiffs.

E. G. Porter, for the defendant.

[STREET, J., 4TH APRIL, 1898.

GIBBONS v. COZENS.

Sale of land contract—Payments by purchaser on account—Judgment recovered by vendor for balance—Right to terminate contract notwithstanding —Forfeiture of payments made.

The plaintiffs were the present trustees under will of one Matthew Curtis, deceased. In 1888 the former trustees contracted to sell to the defendant certain lands in the Michipicoten island for £5,000 sterling. The defendant paid a portion of the purchase money on the 1st June, 1888, the date fixed for the payment of the whole, and gave security for payment of the ballance at a later date, since gone by. The plaintiffs realized upon the security, and on the 2nd March, 1896, recovered judgment against the defendants for the balance, about £1,000, upon the promise to pay contained in the agreement. The defendant had been in possession of the property, and had allowed taxes to the amount of $2,576.95 to accumulate thereon. On the 9th April, 1897, the plaintiffs served the defendants with notice that unless the balance, with interest, were paid on the 29th May, 1897, his rights would be at an end under the contract, and his interest in the land forfeited, and declaring time to be made of the essence of the contract. The defendants had paid no further sums in respect of the contract.

This action was for a declaration that the defendant's right to the land was at an end, and to have the registration of the contract vacated.

Held, that the judgment recovered by the plaintiffs did not affect their right to terminate the contract in case they were unable to realize the amount of the judgment: *Cameron* v. *Bradbury*, 9 Gr. 67. Nor were the plaintiffs bound to return to the defendant the payments they had received on the purchase money as a condition or a result of their cancelling the contract. The deposit, as well as the payments on account, are looked upon as a guaranty that the purchaser will complete his contract, and are forfeited if he do not do so: *Howe* v. *Smith*, 27 Ch. D. 89; *Fraser* v. *Ryan*, 24 A. R. 441.

Judgment for the plaintiffs for a declaration as asked with costs, subject to a provision that no further proceedings should

be taken to recover the amount of the judgment for the purchase money unpaid.

J. Greer, for the plaintiffs.

W. H. Blake, for the defendant.

[7TH APRIL, 1898.

In re BROWN AND CAMPBELL.

Will—Devise—Limitation—"Without lawful heirs begotten"—Estate tail.

A petition under the Vendor and Purchaser Act.

Title was set up under a devise to Joseph Lewis Barkey, his heirs and assigns forever, with a qualification in the following words: "Provided always, nevertheless, that in the event of my said grandson Joseph Lewis Barkey dying without leaving any lawful heirs by him begotten," then the property was to go to other persons.

Held, that the words "dying without leaving any lawful heirs by him begotten" are not within s. 32 of the Wills Act, R. S. O. 1897 c. 128. The statute was intended to correct errors supposed to arise from the use of the word "issue," but was not intended to apply to cases in which the technical word "heirs," though coupled with the word procreation, was used.

Dawson v. *Small*, L. R. 9 Ch. 651; *Re Sallery*, 11 Ir. Ch. R. 286; *Harris* v. *Davis*, 1 Coll. 416; Jarman on Wills, 5th ed., p. 1822; *Re Edwards*, [1894] 3 Ch. 644; Theobald on Wills, 3rd ed., pp. 494-5, referred to.

Joseph Lewis Barkey took an estate tail, which had been converted into an estate in fee simple by the conveyance to Florence Barkey, who conveyed it to the petitioner.

F. Denton, for the purchaser.

C. C. Robinson, for the vendor.

[12TH APRIL, 1898.

SUTHERLAND v. GERMAN.

Fire—Setting out—Damage to timber on adjoining land—Master and servant—Act of servant—Responsibility of master.

Action to recover damages for injury to the plaintiff's land and timber by fire set out by the defendants.

Held, that the damage to the plaintiff was caused by negligence on the part of the defendant Frederick German, for which his father, the defendant Levi German, was responsible.

The clearing of the land by means of fire was a part of the usual business of Frederick, as his father's servant, and the fire was lighted by him for the purpose of clearing his father's land in the usual course of his employment, and the fact that he had no special orders to light this fire did not relieve the father from liability: *Turberville* v. *Stampe*, Ld. Raym. 264; *Filliter* v. *Phippard*, 11 Q. B. 347.

IN CHAMBERS.

[BOYD, C., 5TH APRIL, 1898.

FLEURY v. CAMPBELL.

Discovery—Examination of party—Criminal conversation—Alienation of affections—R. S. O. 1897 c. 73, ss. 7, 9.

An action for criminal conversation and for alienating the affections of the plaintiff's wife is an action instituted in consequence of adultery within the meaning of s. 7 of the Evidence Act, R. S. O. 1897 c. 73, and a defendant in such an action cannot be compelled to submit to examination for discovery.

Mulholland v. *Misener*, 17 P. R. 132, *Taylor* v. *Neil*, *ib.* 134, and *Lellis* v. *Lambert*, 24 A. R. at p. 664, referred to.

Section 9 of the Act has no reference to such an action.

J. W. McCullough, for the plaintiff.

C. C. Robinson, for the defendant.

[6TH APRIL, 1898.

In re TEASDALL v. BRADY.

Married woman—Action against—Debt contracted before marriage—Form of judgment—Division Court—After-judgment summons—Disobedience—Order to commit—Contempt—Punishment—Execution.

A married woman was sued in a Division Court for a debt contracted before marriage, and judgment was given against her personally and against another for the amount of the debt.

Held, that the judgment was properly a personal and not a proprietary one, having regard to her capacity to contract at the time of incurring the liability; and an application, upon *habeas corpus*, to discharge her from custody under an order made in the Division Court for her committal for failure to attend upon an after-judgment summons, was refused.

Scott v. *Morley*, 20 Q. B. D. 128, followed.

Re McLeod v. *Emigh*, 12 P. R. 450, distinguished, and doubted in view of *Aylesford* v. *Great Western R. W. Co.*, [1892] 2 Q. B. 626.

Quære, whether such an order to commit is by way of punishment or execution.

Shepley, Q.C., for the applicant.

W. Cook, for the plaintiff.

[9TH APRIL, 1898.

WILSON v. BOULTER.

Parties—Indemnity—Relief over—Third parties—Identity of claims—Negligence—Breach of contract.

In an action to recover damages for injuries sustained by the plaintiff in the defendants' factory, in October, 1897, the negligence charged was that there was a defect in the lugs holding the door of a retort, whereby they were broken by the force of steam, and the plaintiff thereby injured from the escape of hot air, etc., and that the retort was dangerous because not furnished with a safety valve, whereby the lugs were exposed to an undue pressure of steam. The defendants sought to bring in as third parties the manufacturers of the retort, which was made in January, 1896, under written contracts, which contained no warranty, and from which it appeared that the defendants undertook to provide and put in their own fittings, including the safety valve.

Held, that the object of the Rules permitting a third party to be brought into an action is to prevent the same question, common as between the plaintiff and defendant and the defendant and the third party, from being tried on different occasions and in different forums, and there was no such identity here; there

could be no claim for indemnity against the manufacturers; if the defendants could recover at all, their damages would be assessed on a different principle from those of the plaintiff; and no relief over all could be attained.

Arnoldi, Q.C., for the proposed third parties.

R. McKay, for the defendants.

W. H. Blake, for the plaintiff.

[12TH APRIL, 1898.

DAVIDSON v. COCHRANE.

Gift—Money in savings bank—Assignment to infant—Want of notice—Incompleteness.

An appeal by Hugh D. Cochrane, an infant, by his next friend, from an order of the local Judge of Peterborough directing that garnishees should pay the judgment creditor the moneys due from them to the judgment debtor, and barring the claim of the appellant to such moneys.

The judgment debtor was the mother of the appellant; the moneys in question were in the Canadian Bank of Commerce to the credit of a savings bank account kept in the name of the mother; an entry of an assignment of the moneys to the infant was made in the savings bank book, but the account was still allowed to stand in the name of the mother, and the book itself was held for her, and she had the absolute control of it. No notice of the assignment was given to the infant or to the bank. The mother intended the money to be her son's and to be given or sent to him on his next birthday, when he would be of age.

Held, not a completed gift, the test being whether everything has been done that is required in law to be done to transfer the property.

Appeal dismissed with costs.

Poussette, Q.C., for the appellant.

R. R. Hall, for the judgment creditor.

[MEREDITH, C.J., 11TH MARCH, 1898.

SMEDLEY v. BRITISH AMERICA ASSURANCE CO.

Discovery—Production of documents—Contradicting affidavit—Admissions of deponent—Examination for discovery—Documents mentioned in documents produced.

Where, in an action upon a fire insurance policy, the plaintiff, in making discovery of documents, referred in his affidavit to the application for the insurance, which, when produced, showed that at its date he had a set of books connected with the business in respect of which he was effecting the insurance, which books, however, he did not produce :—

Held, that the books were material, and the reference to them in the document produced was sufficient ground for ordering a better affidavit on production.

Quære, whether the admissions of the plaintiff upon his examination for discovery as to the existence of documents other than those mentioned in his affidavit could be looked at to contradict the affidavit.

Washington, for the plaintiff.

H. D. Gamble, for the defendants.

[FERGUSON, J., 7TH APRIL, 1898.

In re REGINA *ex rel.* HALL v. GOWANLOCK.

Prohibition—County Court Judge—Municipal election inquiry—Municipal Act, s. 220, s-s. 4; s. 227—Proceedings by two relators—Duty of Judge as to second proceeding—Collusion—Jurisdiction—Waiver.

A motion by the respondent for an order continuing a prohibition granted by MACMAHON, J., against further proceedings in the County Court of York, before the senior Judge thereof, to inquire into the validity of the election of the respondent as an alderman for the city of Toronto.

There were two motions pending to try the validity of the election, one before the Master in Chambers in the High Court, which was first in time, and the other before the Judge of the County Court.

Such a motion may be made before the Judge of a High Court or before the Master in Chambers, or before a County Court Judge: s. 220, s.-s. 4, of the Municipal Act. By s. 227, "where more motions than one are made to try the validity of an election, all the motions shall be made returnable before the Judge who is to try the first of them, and the Judge may give one judgment upon all, or a separate judgment upon each one or more of them, as he thinks fit."

When the Judge of the County Court gave his fiat or leave to move, it was known that the motion was pending for the same purpose before the Master in Chambers in the High Court, yet the motion before the County Court Judge was not made returnable before the Master, but before himself. The Judge of the County Court proceeded with the motion before him, and, notwithstanding objections made, decided that there was before him *prima facie* evidence that the first application, that before the Master, was collusive, and that the irregularities manifest on the face of the proceedings, as set out in the affidavits before him, were of such a nature as to support the suggestion that the proceedings before the Master were collusive, and that the irregularities were intended to produce an abortive result; and, such being the case, and the first proceedings being also taken in another Court, he was of opinion that his jurisdiction was not ousted to try and determine the application before him.

Held, that s. 227 is positive and irrevocable in its terms. Collusion in respect of the first motion may be suggested or shown, and it may be suggested that apparent irregularities were intentional and with a view of bringing about an abortive result; but this, if established, could not prejudicially affect a motion by another relator returnable before the same Judge, for his duty would be to pronounce either one judgment upon all the motions before him, or a separate judgment upon each one or more, and if one motion failed for irregularity or collusion, it would not at all follow that another or the others would fail also. Although the County Court Judge had jurisdiction at the commencement, yet when he departed from the course he was bound to pursue, by not making the motion before him returnable before the Master, and by going on regardless of the existence of the first motion, he was proceeding without juris-

diction, and the evidence was not sufficient to show that he right to object to the jurisdiction had been waived.

Order made continuing the prohibition with costs.

Marsh, Q.C., and *G. G. S. Lindsey*, for the respondent.

DuVernet, for the relator.

NEW BRUNSWICK

In the Supreme Court.

IN CHAMBERS.

[McLeod, J., 11th April, 1898.

LOGUE v. PRESCOTT.

Sheriff—Duty of—Replevin bond—Exhibiting to defendant.

The defendants in an action of replevin applied to the sheriff to see the bond; the sheriff refused to show it, upon the ground that the defendants had no right to see it until it was forfeited; and thereupon the defendants made application to the Court for an order to compel the sheriff to exhibit to them the bond.

Held, that a sheriff before he executes a writ of replevin is in duty bound to take a bond according to the terms of 60 V. c. 24, s. 354; and the defendant on application to the sheriff is entitled to see the bond before he takes any step in the cause.

C. N. Skinner, Q.C., for the sheriff.

A. A. Wilson, for the defendants.

MANITOBA.

In the Queen's Bench.

[BAIN, J., 1ST APRIL, 1898.

GRAHAM v. BRITISH CANADIAN L. & I. CO.

Appeal—Entry—Time—Pronouncing or entry of judgment—Rule 646.

Application by the defendants to strike out an appeal by the plaintiffs to the full Court, on the ground that it had not been entered within fourteen days, as required by the Rules.

The judgment appealed against was pronounced on the 27th November, 1897, but the minutes were not settled until the 23rd February, 1898, and the judgment was not entered until the 24th February. The judgment was in the nature of a decree (*ante* 34), and under the old practice would have been so called. It was not questioned that the judgment was one that had to be entered under Rule 621; and Rule 646 (*a*) provides that in case of a judgment or decree required by the practice to be entered, the time for filing the præcipe by way of appeal is fourteen days from the date of such entry. Rule 646 (*d*), as it originally stood, read: "In the case of any other verdict or decision, the time shall be 14 days from the entry of the judgment, order, decree, or certificate, made upon or embodying such verdict or decision." But s.-s. (*d*) was amended by 60 V. c. 4 to read: "In the case of any other verdict or decision, the time shall be 14 days from the rendering of the verdict or decision."

"Verdict," according to the interpretation clauses of the Act includes the finding of a jury and the decision of a Judge.

Held, that the application should be dismissed, but without costs. Sub-section (*d*) might be read as intended to apply to any cases that are not covered by the preceding provisions of the Rule, and by reading it in that way s.-s. (*a*) might

be held to apply to all judgments or decrees that have to be entered, whether made in pursuance of the decision of a Judge on the trial of an action or on a motion to a single Judge in Court.

In an indirect way Rule 566 tends to support this view.

PRINCE EDWARD ISLAND.

In the County Court of Queen's County.

[ALLEY, C.C.J., MARCH, 1898.

WHEATLEY v. CITY OF CHARLOTTETOWN.

Municipal corporations—License fee paid under illegal by-law—Action to recover back—Mistake in law—Voluntary payment—Duress—Payment colore officii.

An action for money bad and received. The plaintiff claimed to recover from the city corporation $15 paid on his behalf to the city clerk in May, 1896, for a license to sell milk, under a by-law passed for this purpose by the city council in 1885, but which was not enforced until 1896, and which was either *ultra vires*, or, if regularly passed, not ratified by the Legislature as it should have been. Nevertheless at the time the money was paid the by-law was believed both by the plaintiff and defendants to be in force as a valid and existing law. The payment was made voluntarily, *i.e.*, without any actual pressure or compulsion, by the plaintiff's brothers on his behalf.

Held, that money voluntarily paid, with a knowledge of all the facts, but under a mistake of law, cannot in general be recovered back—*ignorantia legis neminem excusat*: Roscoe's N. P., 14th ed., p. 55; *Bilbie* v. *Lumley*, 2 East 469; *Higgs* v. *Scott*, 7 C. B. 68; *Knibbs* v. *Hall*, 1 Esp. 84; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Platt* v. *Bromage*, 24 L. J. Ex. 68; *East India Co.* v. *Tritton*, 3 B. &. C. 280; *Rogers* v. *Ingham*, 3 Ch. D. 351.

And money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot—there being no coercion, ignorance, or mistake of fact, but only ignorance or mistake of law—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced: Dillon on Municipal Corporations, vol. 2, ss. 940, 944, 945, 947; *Emory* v. *Lowell*, 127 Mass. 138; *Mayor of Baltimore* v. *Lefernan*, 4 Gill (Md.) 425; *Taylor* v. *Board of Trade*, 31 Pa. St. 73; *Marriot* v. *Hampton*, Sm. L. C., Am. Notes, p. 1706.

It was contended, however, that as in this case a demand was made by an official of the corporation, the collector, and the money was paid to an official of the corporation, the clerk, the money was therefore paid *colore officii* to a person who had, in the belief of the payer, the right to collect it, and the payment was not voluntary, because the parties were not on an equal footing.

As to this, the evidence showed that the city clerk had no conversation with the persons who made the payment; they did not ask to see the by-law; no demand for payment was made upon the plaintiff himself; there was some slight evidence of a demand by the collector upon the plaintiff's brothers; the collector had no power under the by-law to enforce any such demand except by suit.

Held, that payments made *colore officii* rest upon the principle of that species of compulsion known as duress, and the question is what constitutes such duress. Threats of legal process do not amount to such duress, for the party may plead and make proof, and show that he is not liable. The coercion or duress which will render a payment involuntary must in general consist of some actual or threatened exercise of power possessed or believed to be possessed by the person exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making payment; and the facts of this case did not show coercion or duress of that kind.

Dicta of Parke and Martin, BB., in *Steele* v. *Williamson*, 8 Ex. 629, and of Abbott, C.J., and Littledale, J., in *Morgan* v. *Palmer*, 2 B. & C. 735, explained.

Knibbs v. *Hall*, 1 Esp. 84; Dillon, vol. 2, s. 943; *Boston and Sandwich Gas Co.* v. *City of Boston*, 4 Metc. 181; *Preston* v. *City of Boston*, 12 Pick. 7; *Joyner* v. *Egremont*, 3 Cush. 572; *Lincoln* v. *City of Worcester*, 8 Cush. 58, referred to.

Judgment for the defendants.

A. Peters, Q.C., and *A. Ernest Ings*, for the plaintiff.

The Recorder, for the defendants.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[Boyd, C., Ferguson, J., 16th April, 1898.

HUNTER v. TOWN OF STRATHROY.

Costs—Summary disposal of, in Chambers—Jurisdiction—Absence of consent—Object of action not attained.

The plaintiff claimed in this action damages for injury to his person and property by the alleged negligence of the defendants in having a foul drain in front of his property, and an injunction. The defendants denied the plaintiff's allegations, and alleged that if the plaintiff had suffered any injury it was by his own negligence. Before trial of the action, the defendants opened and inspected the drain and did some work upon it. The plaintiff, professing to regard this as a compliance with his demand, asked the defendants to consent to the costs being disposed of by order in Chambers, to which the defendants answered that the work was being done in the ordinary course of municipal work, without the intention of admitting any liability, and refused to consent. The plaintiff moved in Chambers, without consent and against the objection of the defendants, and obtained an order for payment by the defendants of the costs of the action.

Held, that, under these circumstances, there was no jurisdiction to summarily dispose of the costs in Chambers, the object of the action not having been substantially attained.

Knickerbocker v. *Ratz*, 16 P. R. 191, distinguished.

Osler, Q.C., and *D. L. McCarthy*, for the defendants.

W. H. Blake, for the plaintiff.

[FALCONBRIDGE, J., 23RD MARCH, 1898.

CHAPIEWSKI v. CAMPBELL.

Free grant lands—Sale of timber by locatee—Validity of—Subsequent issue of patent to vendor—Estoppel.

A locatee of free grant land under R. S. O. 1877 c. 24 has no power to sell the trees or timber thereon, and the subsequent issue of the patent to him will not feed the estoppel and validate a previous grant or sale.

J. H. Moss, for the plaintiff.

E. T. English, for the defendants.

[STREET, J., 20TH APRIL, 1898.

In re HEWETT AND JERMYN.

Will—Devise to two persons in trust as executors—Renunciation of probate by one—Disclaimer of trust—Whole estate vested in the other trustee—Devolution of Estates Act—Application of.

Petition under the Vendors and Purchasers Act by William Hewett, the executor of the will of his late wife, Emily Hewett, who died on the 18th March, 1892, seised in fee simple of the lands in question. Joseph T. Rolfe, one of the two executors named in the will, renounced his right to probate, and probate was granted to the petitioner as sole executor. On the 19th February, 1898, he contracted to sell to Thomas J. Jermyn the lands in question, for the purpose of procuring money to pay the debts of the deceased and of otherwise administering her estate. The deceased left seven children, all of whom were surviving; one of these children had made a conveyance to a third person of all his interest in his mother's estate, which conveyance had been registered.

The purchaser objected to the petitioner's title upon the ground that the vendor should have registered a caution under the Devolution of Estates Act if he desired to sell the land for the payment of debts, and that his power to sell, in the absence of the other executor named in the will, was of too doubtful a character to enable him to force the title upon the purchaser.

The devise was to William Hewett and Joseph T. Rolfe *in trust as executors* to carry out the provisions of the will.

Held, that Rolfe, having renounced his right to probate, had disclaimed the trust attached to the devise; he could not act as executor, and therefore could not act in the trust with which the testatrix sought to clothe him in his character of executor only: R. S. O. c. 59, s. 65; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; *Denne* v. *Judge*, 11 East 288.

The disclaimer of one devisee in trust has the effect of vesting the whole estate in the other trustee for the purposes of the trust: *Crewe* v. *Dechen*, 4 Ves. 97; *Adams* v. *Taunton*, 5 Mad. 435; *Nicloson* v. *Wadsworth*, 1 Ha. 434; Lewin on Trusts, 6th ed., p. 178; *Small* v. *Marwood*, 9 B. & C. 299.

Held, upon the other point, that s. 13 of the Devolution of Estates Act, R. S. O. c. 127, in no way interferes with the devise to the executors.

In re Koch and Wideman, 25 O. R. 262, followed.

Order made declaring that upon the objections made the petitioner has the right to convey. Costs to be paid by the purchaser.

J. B. Holden, for the petitioner.

H. Cassels, for the purchaser.

[22ND APRIL, 1898.

BURRELL v. BLACKBURN.

Life insurance—Apportionment by insured—Preferred beneficiary class—R. S. O. c. 103, s. 159, s.-s. 8.

Action to recover certain life insurance moneys. The insured upon the face of the policy made it payable to her husband and child in equal shares. The child having predeceased her, she sought by an indorsement on the policy and by will to make the insurance money payable to her sister, the plaintiff.

Held, that she was prevented from doing this effectively by the provisions of s. 159, s.-s. 8, of R. S. O. c. 103, which invalidate any declaration in favour of a person outside the preferred beneficiary class, and give to the surviving member of that class all sums originally apportioned to members of the favoured class.

Judgment for the defendant, the husband of the insured.

In the Surrogate Court of the County of York.

[McDougall, Surr. J., 25th March, 1898.

In re RENFREW ESTATE.

Revenue—Succession duty—Liability of estate for—Property in another Province—Testator domiciled in another Province—Surrogate Courts—Jurisdiction.

The authority conferred by the Surrogate Courts Act, R. S. O. 1897 c. 59, ss. 17, 18, has not been limited or interfered with by the provisions of the Succession Duties Act, and the Judge of a Surrogate Court is bound, when requested, to determine whether a particular estate of which probate or administration is sought, is liable or not to pay duty; his decision being subject to appeal under s. 36 of the Surrogate Courts Act.

Where a deceased person had his domicil, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his whole estate, including property in the Province of his domicil, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty.

An application by the executors for a direction that letters probate of a will should issue without the filing of a bond under the Succession Duties Act.

D. T. Symons, for the applicants.

No one appeared for the Solicitor for the Treasury.

McDougall, Surr. J.—This is an application on behalf of the executors of the will of the late G. R. Renfrew for the issue to them out of the Surrogate Court of the County of York of letters probate to so much of the estate of the testator as is situated within this Province. The domicil of the testator was in the Province of Quebec, where he was possessed of considerable property. His will was executed in that Province, where he also died, and purports to dispose of his whole estate, wheresoever situate. The sworn value of the estate in this Province —all personalty—is $65,209, and the value of the personal estate situate in the Province of Quebec is considerably above $50,000. The aggregate value of the estate of the testator in the two Provinces exceeds $100,000. The Solicitor for the

Treasury, having become aware that the aggregate value of the estate thus computed exceeds $100,000, claims that the Crown is entitled to succession duty at the rate of two and a half per cent. upon the value of the property in Ontario. He refuses to authorize the issue of letters probate until the duty has been paid or the executors file a bond to secure the payment. The solicitors for the executors now make this application to me as Surrogate Judge to direct letters probate to issue to them without the filing of the bond provided for in s. 5 of the Succession Duties Act, R. S. O. 1895 c. 24. Notice of this motion was served upon the Solicitor for the Treasury, but he did not attend, nor was any cause shown on behalf of the Crown, upon the return of the motion.

The first question to be determined is: Have I jurisdiction to make the order asked for? Section 17 of the Surrogate Courts Act, R. S. O. 1897 c. 59, reads as follows:—"All jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estate or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration, shall continue to be exercised in the name of Her Majesty, in the several Surrogate Courts; but this provision shall not be construed as depriving the High Court of jurisdiction in such matters." Section 18 further defines the express powers of the Surrogate Courts: "To hold cognizance of all matters relative to the granting of probates, and committing letters of administration, and to grant probate of wills and commit letters of administration of the property of persons dying intestate, having property in Ontario, etc. 2. To hear and determine all questions, causes and suits in relation to the matters aforesaid," etc. Section 5 of the Succession Duties Act, R. S. O. 1897 c. 24, directs executors and administrators to file inventories and lists of persons to whom the property passes, stating the degree of relationship they bear to the testator or intestate, and requires them to pay the duty or file a bond, the penal sum of which shall be equal to ten per cent. of the sworn value of the property of the deceased person, "liable, or which may become liable, to succession duty." But by s.-s. 2 of the same section it is expressly enacted

that s. 5 shall not apply to estates in respect of which no succession duty is payable. By s. 13 of the same Act the Surrogate Judge is given power to extend the time for the payment of the duty; and by s. 18 he is further given power to make an order for the payment of duty which appears to him not to have been paid in respect of any estate.

It appears to me that the authority conferred by the Surrogate Courts Act has not been limited or interfered with by the provisions of the Succession Duties Act, and that I am bound, when requested, to determine whether a particular estate of which probate or administration is sought, in the Surrogate Court of the County of York, is liable or not to pay duty. Any judgment I may pronounce is subject to appeal under s. 36 of the Surrogate Courts Act.

Now, as to the merits of the application. Section 2 of the Succession Duties Act defines "property" in the Act as including real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or by passing at the death of the owner to his heirs or personal representatives. Section 3 enacts that the Act shall not apply where the property passing under a will, intestacy or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, son-in-law or daughter-in-law of the deceased does not exceed $100,000. Mr. Renfrew bequeathes his whole estate to his wife and children, so that the estate in question comes within this exception, unless it exceeds $100,000 in value.

Section 4 defines what property is subject to succession duty: "(*a*) All property situate in this Province . . . whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy."

Sub-section (3) provides that where the aggregate value of the property of the deceased exceeds $100,000 and passes to wife, children, etc., etc., it will be liable to $2.50 for every $100 of the value.

Sub-section (8) is an important sub-section as throwing light upon the intention of the Legislature. This provides that any portion of an estate of any deceased person brought into the Province, whether at the time of his death such person was

domiciled in Ontario or elsewhere, by the executors or administrators to be administered or distributed in Ontario, shall be liable to the duty; but it enacts that if such property so brought in paid duty elsewhere, such duty, if equal to the Ontario duty, will extinguish the same, or if less, the difference only shall be payable to the Treasurer of Ontario.

Sub-section (9) makes an executor or administrator personally liable for the duty, if, in order to escape payment, he distributes assets outside of Ontario; but the sub-section is not to apply to payments made to persons domiciled outside the Province from assets situated outside the Province.

It appears to me that the whole scope and object of the statute is to tax: (1) All the property of a deceased person situate in the Province, no matter where the deceased has his domicil; and (2) to tax, in the case of a person dying domiciled in the Province, all personal property owned by such deceased person outside the Province which in the course of administration must be or ought to be brought into the Province for administration or distribution to persons or beneficiaries domiciled within the Province. This is an adoption or application in part of the principle of "*mobilia sequuntur personam*" evolved in the construction of the English Legacy and Estate Duty Acts.

Now, it is unnecessary for me to express my opinion upon the meaning of the expression "aggregate value of the property," as applied to the case of the estate of a person domiciled in Ontario. The matter before me relates only to the estate of a deceased person who, prior to and at the date of his death, had his domicil outside this Province. As to such a person, I have no hesitation in stating it as my opinion that the expression "aggregate value of the property" can only mean the aggregate value of the property situate in the Province of Ontario, to which would be added any property situate outside the Province, but brought into Ontario by executors of such a person, to be paid to beneficiaries domiciled in Ontario. It appears to me that this is the only property of a non-domiciled testator or intestate that the Province has the right under our Constitutional Act to tax: see s. 92, B. N. A., sub-heads (2), (13). They cannot tax real or personal property situate outside of the Province. That the Legislature appreciated this view is fairly

indicated, I submit, by s.-s. (8) of s. 4 of the Succession Duties Act, where the provision is made that property situate outside is only liable to duty when brought into the Province. It is also shown by s.-s. 9 of s. 4, which enacts that the executor or administrator shall be personally liable to pay the duty in all cases where he, in order to escape the payment of duty, distributes outside the Province any estate which for the purpose of such distribution ought properly to have been brought into the Province for that purpose. Such would be payments made or shares paid to persons who at the time of such payment or distribution had their domicil in Ontario.

I make the following findings of fact and law :—

(1) That the said G. R. Renfrew, deceased, had his domicil, prior to and at the time of his death, in the Province of Quebec.

(2) That the value of his property and estate situated in the Province of Ontario is under the sum of $100,000.

(3) That, as by the terms of his will he devised the whole of his estate in this Province to his wife and children, the said property in this Province, being under the value of $100,000, is not liable to pay succession duty.

In case there should be an appeal from this judgment, and to have the facts clearly before the appellate Court, I further find as a fact :—

(4) That the said G. R. Renfrew, at the date of his death, was possessed of, and there passed under his will, property situate in the Province of Quebec, the value of which, if added to the value of the property in this Province, would in the aggregate exceed $100,000 in value.

The letters probate may issue twenty-one days after the date of this order. The Treasury Department will thus have the fifteen days mentioned in s. 36 of the Surrogate Courts Act to appeal from this order, if it is so advised.

PRINCE EDWARD ISLAND.

In the County Court of King's County.

[REDDIN, C.C.J., 11TH APRIL, 1898.

GALLANT v. MELLETT.

Sale of goods—Lien note signed after sale and delivery—Trespass—Justification.

Trespass for wrongfully taking away from the dwelling-house of the plaintiff a cooking stove, and thereby causing the plaintiff damage, and depriving him of the stove. The defendant pleaded leave and license, and justified under a lien note signed by the plaintiff and overdue and unpaid at the time of taking.

The evidence proved the entering of the plaintiff's house and the taking of the stove against the plaintiff's will. The defendant produced the lien note. It contained the following clause: "I further agree to furnish satisfactory security, if required. I am to have immediate possession and use of the article for which this note is given, but the property therein is not to pass to me until full payment of the price, and of any obligations given therefor, or for any part thereof. If I make any default, you may resume possession and sell the article to pay the unpaid balance of the price, whether due or not."

In rebuttal the plaintiff showed that the note had been given for a balance due on the price of the stove, and had been signed by him seven months after the sale and delivery of the article. He denied knowledge that the note was a lien note.

Held, that, as the note was signed after the sale and delivery of the stove, the lien clause was inoperative so far as the stove was concerned, and the defendant's trespass was not justified.

Judgment for the plaintiff for $20 damages and costs.

Arthur Mellish, for the plaintiff.

J. A. Mathieson, for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 11TH APRIL, 1898.

UNION BANK OF CANADA v. BARBOUR.

Fraudulent preference—Voluntary transfer—Subsequent sale to innocent purchaser—Following proceeds.

In 1896 the plaintiffs brought an action against the defendant James Barbour, and on the 2nd June obtained a verdict. At this time Barbour was the owner of two lots of land and a house. By deed of the 29th May, 1896, he conveyed the land to one Smith, the affidavit of execution being sworn to on the 1st June, and the deed registered on the 2nd June.

The consideration expressed in the deed was $300, and the sale was subject to a mortgage for $500 to the Globe Loan Company. The consideration was paid by Barbour receiving Smith's note at five months for $100, and a cheque of the solicitor who acted for both parties for $200. The note and cheque Barbour handed to his wife, to whom he stated he owed money. By lease bearing the same date as the deed, Smith leased the property to the defendant Mrs. Barbour for the term of five years at a monthly rental of $6.65. The mortgage to which the deed was made subject was one under which monthly payments of $6.65 had to be made.

The lease contained an agreement giving Mrs. Barbour the option of purchasing the property for $312.50 at the end of the term. During the currency of the lease Barbour, the husband, paid the $6.65 each month, and the amounts he paid were at once handed over by Smith to the agent of the loan company. At the end of the five months Mrs. Barbour purchased the property, and Smith conveyed it to her by deed dated the 29th October, 1896. All the bargaining for the deed to Smith, for the lease, and for the purchase by Mrs. Barbour, was done by James Barbour, the husband, acting, as he stated, as agent for his wife.

By deed dated the 17th November, 1897, Mrs. Barbour conveyed the property to the defendant Wenman for $950.

The plaintiffs alleged that the purchase money due from Wenman was really the money and property of James Barbour, and ought to be made available for payment of their judgment, and they asked that Wenman might be ordered to pay to them a sufficient amount of the purchase money to satisfy their judgment.

Wenman alleged that he was a *bona fide* purchaser for value, and that previous to any notice of the plaintiffs' claim he paid all the purchase money, except $365, which he was ready and willing to pay over to the party entitled. At the trial the plaintiffs' counsel accepted Wenman's statement that the balance still due from him was only $365. There was no evidence that Barbour was indebted to his wife.

Held, that the transaction was one by which it was sought to put the property out of the reach of creditors. The question was whether the plaintiffs were entitled to a judgment for the payment of the balance due from Wenman. Any right they would have to attack as fraudulent the transaction by which the property was conveyed to Mrs. Barbour was derived from the statute, and it went no further than giving a right to have the fraudulent conveyance set aside as against them. A creditor could not take proceedings for that purpose after the property had passed out of the hands of a fraudulent grantee into those of a purchaser for value: *Campbell* v. *Campbell*, 29 Gr. 252.

The plaintiffs could not have the sale to Wenman set aside, because they admitted that he was a *bona fide* purchaser for value. He became such before they instituted this action or took any proceedings to impeach the conveyance made by the judgment debtor.

The plaintiffs could not have the relief they sought: *Tennant* v. *Gallow*, 25 O. R. 56; *Vyse* v. *Brown*, 18 Q. B. D. 199; *Robertson* v. *Holland*, 16 O. R. 532.

Mrs. Barbour sold the property to a *bona fide* purchaser for value, and had she received the purchase money, an action would not lie against her to pay it over to the plaintiffs; they could have no claim against Wenman, except in so far as he was a debtor to Mrs. Barbour; they could have no rights against him beyond what they had against her; they could not call upon her

to account for the money, and no more could they call upon Wenman to do so.

Action dismissed against James Barbour and Mrs. Barbour, without costs. Wenman would be entitled to his costs, including those of appearing at the trial. It was not until then that the plaintiffs admitted the correctness of his submission as to the amount remaining due from him.

J. A. Taylor, for the plaintiffs.

H. Acheson, for the defendants the Barbours.

A. D. Cameron, for the defendant Wenman.

[DUBUC, J., 5TH APRIL, 1898.

DOUGLAS v. PARKER.

County Court appeal—Right of appeal—Amount in question—Jurisdiction.

The action was brought in a County Court to recover the value of thirteen or fourteen tons of hay belonging to the plaintiff, alleged to have been taken by the defendant. The jury returned a verdict for the defendant, and the plaintiff appealed.

Held, that the appeal should be dismissed with costs.

A Judge in appeal has power to draw inferences of fact and to decide all questions of fact as a jury might do, as well as questions of law. On the evidence adduced the hay was worth very little; its real value was not more than fifty cents, or at the utmost one dollar a ton. The plaintiff would not be entitled to recover, in any event, more than $14.

By s. 315 of the County Courts Act, as amended by 59 V. c. 3, no appeal lies when the amount, or the value of the goods in question, is under $20. In *Aitken* v. *Doherty*, 11 Man. L. R. 624, 17 Occ. N. 349, it was held by the full Court that "the amount in question" means the amount that the plaintiff might possibly have recovered.

McMeans, for the plaintiff.

Elliott, for the defendant.

[KILLAM, J., 12TH APRIL, 1898.

McILROY v. McEWAN.

County Court—Counterclaim in excess of jurisdiction—Abandonment of excess—Transfer to Queen's Bench.

Motion to transfer the action from a County Court to the Queen's Bench, on the ground that the counterclaim filed by the defendant was beyond the jurisdiction of the County Court.

Held, that the application should be dismissed without costs.

Under the County Courts Act, R. S. M. c. 33, s. 67, a party is only entitled to set up a counterclaim for an amount beyond the jurisdiction of a County Court by abandoning the excess. Apparently there had been no formal abandonment of the excess in this case, but, notwithstanding this, and apart from the question whether the mere act of putting in the counterclaim constitutes such an abandonment, a defendant cannot acquire a right to a transfer of the action from the County Court to the Court of Queen's Bench by filing a counterclaim for an amount beyond the jurisdiction. The condition to the right to set it up at all is the abandonment of the excess, in which case the counterclaim could not be said to involve matters beyond the jurisdiction of the County Court.

The excessive amount must either be deemed to be abandoned, or the counterclaim was improperly put in for the larger amount. In the former case the transfer is not authorized, and in the latter the defendant could not thus obtain a right to take away the plaintiff's right to sue in the County Court, nor should a Judge, as a matter of discretion, interfere to do so.

Hull, for the plaintiff.

Bradshaw, for the defendant.

IN CHAMBERS.

[KILLAM, J., 4TH APRIL, 1898.

MOORE v. KENNEDY.

Q. B. Act, 1895, Rules 334a, 665—Interlocutory judgment—Leave to defend—Defence on merits—Discretion of Judge.

An appeal by the plaintiff from an order of the Referee in Chambers setting aside the interlocutory judgment entered for the plaintiff upon payment by the defendant to the plaintiff of the costs of signing and entering judgment and of the costs of the application, except the costs of the examination of the defendant by the plaintiff.

Held, that the order of the Referee should not be disturbed, or other conditions imposed. The evidence did not show a defence upon the merits; but under Rules 334(*a*) and 665, a defendant is not obliged to show the existence of a defence upon the merits as clearly as was required in order to set aside a judgment in default of appearance under the Common Law Procedure Act. There is a discretion to let him in if a Judge thinks that, under the circumstances, he ought to be permitted to defend, as under Rule 596. Under both Rules, where a good defence is not sufficiently made out, terms may be imposed, but this is wholly discretionary, and not obligatory upon the Judge.

There was a *bona fide* intention to defend. There was a mistake as to the time of service, and an attempt to put in the defence, only one day too late. The action was one for damages, and not for the recovery of a debt. The judgment was interlocutory, and an assessment of damages must still be had.

The case appeared to be one in which it was not unreasonable to let the defendant in upon the terms imposed.

Appeal dismissed with costs to the defendant in any event.

Phillips (*Allen & Cameron*), for the plaintiff.

Metcalfe, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUSTICES IN BANC, 11TH FEBRUARY, 1898.

REGINA v. SKELTON.

Criminal law—Perjury—False statutory declaration—Indictment—Omission of statement of intent to mislead—Criminal Code—Forms—Preliminary inquiry—Evidence taken against three defendants—Amendment of indictment—Privilege of Crown prosecutor—Election as to method of trial—Right to re-elect after amendment—Admissibility of evidence—Statement on oath at preliminary inquiry—Authorized declaration—Canada Evidence Act, 1893, s. 26—Indictable offence—Joint declaration by three persons.

Crown case reserved by WETMORE, J., upon an indictment and conviction of the defendant for perjury, and heard by RICHARDSON, ROULEAU, and SCOTT, JJ.

The original charge was that the defendant at Battleford, on or about the 16th day of April, A.D. 1897, in a certain solemn declaration made voluntarily before a justice of the peace in and for the North-West Territories, did falsely, wilfully, and corruptly declare and state of J. B. M. to the effect and in the words following, that is to say:—"We," meaning the defendant and others, "know that he," meaning J. B. M., "kept in the Conservative committee rooms the Battleford list of voters that had been made out and posted by the enumerator. This, we believe, was done to allow the Conservative committee to examine and revise such lists, and also to prevent their being always open to examination by the public, as provided by law, and that by such action injury was done *to* the Liberal candidate."

Upon the defendant being arraigned upon this charge, he applied, before pleading to it, to quash it, because it did not allege, in the language of s. 147 of the Criminal Code, that the statement set out in such paragraph was one authorized or required by law to be made on solemn declaration; and because it did not allege that the statement was made with intent to

mislead; and because the offence set out was not founded upon the facts or evidence disclosed in the depositions taken at the preliminary examination, and the charge was not preferred by the Attorney-General nor by his direction nor consent, nor with the consent of a Judge; and because the preliminary inquiry was held against three persons, including the defendant, and not against the defendant alone.

The Crown counsel made a general application to amend, if necessary. The trial Judge refused to quash the charge, and stated that if the Crown wished to amend, the amendments should be specified.

The defendants then pleaded "not guilty," and elected to be tried by a Judge with a jury, and the Court was adjourned till the following day.

Next morning, at the opening of the Court, the Crown applied to amend by striking out the word "to" in italics at the end of the words quoted, and by adding the words "he, the said defendant, being then duly authorized by law to make any statements on solemn declaration (s. 147)."

The trial Judge allowed the amendments to be made, and a plea of "not guilty" was entered by the defendant to the amended charge.

The defendant's counsel then stated that he desired to withdraw his election to be tried by a jury, and to elect to be tried by a Judge alone, and asserted his right to re-elect, as he had been called upon to plead *de novo;* but the trial Judge refused to allow him to re-elect; and the trial proceeded with a jury.

At the preliminary examination of the defendant before a justice of the peace, after the examination of the witnesses for the prosecution, the defendant was addressed by the justice in these words: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given against you at the trial." Whereupon the defendant made a statement, but, before making it, he was, at his own request, sworn. The statement was taken down in writing and signed by the defendant, and was offered by the Crown in evidence and received at the trial, against the objection of the defendant.

Section 147 of the Criminal Code enacts that "everyone is guilty of an indictable offence . . . who, being required or authorized by law to make any statement, oath, affirmation, or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding." Perjury is defined by s. 145, and one of the ingredients of the offence is that the statement must have been made with the intention to mislead. By s. 611, s.-s. 8, it is provided that the statement of a charge may be in any words sufficient to give the accused notice of the offence with which he is charged, and form FF in the schedule, which expressly refers to s. 611, gives examples of the manner of stating offences under it, while s. 982 provides that the forms, varied to suit the case, or forms to the like effect, shall be deemed sufficient in law.

Held, that the forms FF are intended to illustrate the provisions of s. 611, and their effect is not confined to the offences stated in them; and, as, if the charge here had contained an allegation of intent to mislead, it would not have given the defendant any better notice of the offence than he had, it was unnecessary. The statement in Taschereau's Criminal Code, p. 675, dissented from.

2. That the charge was founded upon facts and evidence disclosed in the depositions taken before the justice on the preliminary examination; that such preliminary examination was sufficient for the purpose; and that the fact that it was held against three persons was immaterial, there being separate informations, but only one inquiry.

3. That the trial Judge had power to allow the charge to be amended as it was amended; the Crown Counsel had the right under s. 11 of the North-West Territories Amendment Act, 54 & 55 V. c. 22, to substitute another charge in respect of the same offence, and having that right, he could amend the original charge, instead of substituting a new one. In the North-West Territories the Crown prosecutor is the accuser, not the grand jury, as in England.

4. That the trial Judge was justified in refusing to allow the defendant to withdraw his election. *Regina* v. *Brewster*, decided by this Court, followed.

5. That the defendant's statement made before the justice was properly admitted in evidence.

6. That the offence as charged and proved was an indictable one under s. 147 of the Code. The object of s. 26 of the Canada Evidence Act, 1893, was to provide a means by which certain statements not authorized to be made on oath could be verified. The permission to receive a solemn declaration includes authority to make it.

7. That the objection that the personal pronoun "we" was used in the declaration was not a good objection. Each one of the declarants may be taken to have alleged his own personal knowledge of the matters set out in the declaration.

R. F. Chisholm, for the Crown.

T. C. Johnstone, for the defendant.

Supreme Court of Canada.

EXCHEQUER COURT.] [8TH MARCH, 1898.

BALDERSON v. THE QUEEN.

Crown—Civil servant—Superannuation allowance—R. S. C. c. 18—Construction of—Discretion.

Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of s. 11 of the Civil Service Superannuation Act, R. S. C. c. 18, have no absolute right to any superannuation allowance under that section, such allowance being, by the terms of the Act, entirely in the discretion of the executive authority.

Judgment of the Exchequer Court of Canada affirmed.

Hogg, Q.C., for the appellant.

Newcombe, Q.C., for the respondent.

[14TH MARCH, 1898.

AUER INCANDESCENT LIGHT MFG. CO. v. DRESCHEL.

Appeal—Jurisdiction—Amount in controversy—Conflicting affidavits—Costs.

On a motion by the plaintiffs to quash the appeal of the defendants from the judgment of the Exchequer Court of Canada, *ante* 166, where the respondents filed affidavits that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate Court, and affidavits were also filed by the appellants showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the Court to hear the appeal

did not appear until the filing of the appellants' affidavits in answer to the motion.

C. A. Duclos, for the plaintiffs.

R. V. Sinclair, for the defendants.

ONTARIO.] [9TH DECEMBER, 1897.

HALSTEAD v. BANK OF HAMILTON.

Banks and banking—Collateral security—R. S. C. c. 120, Schedule "C"—53 V. c. 31, ss. 74, 75—Bills and notes—Renewals—Assignments.

An assignment made in the form "C" to the Bank Act as security for a bill or note given in renewal of a past due bill or note, is not valid as a security under s. 74 of the Bank Act.

The judgment of the Court of Appeal, 24 A. R. 152, 17 Occ. N. 114, affirmed.

J. J. Scott, for the appellants.

Gibbons, Q.C., for the respondent.

MALONEY v. CAMPBELL.

Action—Right of—Conveyance subject to mortgage—Obligation to indemnify—Assignment of—Principal and security—Implied contract.

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.

Judgment of the Court of Appeal affirmed.

C. H. Ritchie, Q.C., and *Boland,* for the appellant.

W. D. McPherson and *J. M. Clark,* for the respondent.

SMALL v. THOMPSON.

Covenant—Married woman—Covenant by grantee in deed of lands—Non-execution by grantee—Obligation to pay mortgagee—Accepting benefits of deed—Enforcement of covenant by assignee.

Where a deed of lands to a married woman, which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators, and assigns, and she took possession of the lands and enjoyed the same and the benefits thereunder, without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf; and an assignee of the covenant could enforce it against her separate estate.

Judgment of the Court of Appeal reversed.

E. D. Armour, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent.

BURNS v. WILSON.

Bankruptcy and insolvency—Fraudulent preference—Chattel mortgage—Advances of money—Solicitor's knowledge of circumstances.

In order to give a preference to a particular creditor, a debtor in insolvent circumstances executed a chattel mortgage upon his stock in trade in favour of a money lender, by whom a loan was made. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor, who, at the same time, delivered to the solicitor, to be held by him in escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the Acts respecting assignments and preferences,

and to bring the case within the ruling in *Gibbons* v. *Wilson*, 17 A. R. 1.

Held, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bona fide* payment of money within the meaning of the statutory exceptions.

Judgment of the Court below reversed.

Gibbons, Q.C., for the appellants.

Ritchie, Q.C., for the respondent Wilson.

J. J. Scott, for the respondents the W. E. Sanford Manufacturing Company.

In re CENTRAL BANK OF CANADA.

HOGABOOM'S CASE.

Winding-up Act—Moneys paid out of Court—Order made by inadvertence—Jurisdiction to compel repayment—R. S. C. c. 129, ss. 40, 41, 94—Locus standi of Receiver-General—55 & 56 V. c. 28, s. 2—Construction of.

The liquidators of an insolvent bank passed their final accounts, and paid into Court a balance remaining in their hands. It appeared that by orders, issued either through error or by inadvertence, the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, 24 A. R. 470, 17 Occ. N. 281, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that, even if he was not so entitled to intervene, the provincial Courts had jurisdiction to compel repayment into Court of moneys improperly paid out.

S. H. Blake, Q.C., and *W. R. Smyth*, for the appellants.

Newcombe, Q.C., and *F. E. Hodgins*, for the Receiver-General.

McCarthy, Q.C., for the liquidator.

QUEBEC.] [16TH FEBRUARY, 1898.

PERRAULT v. GAUTHIER.

Trade union—Combination in restraint of trade—Preventing non-union workmen from obtaining employment—Action for damages.

Workmen, who, in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation, or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages.

Judgment of the Court below affirmed.

Lafleur and *Lanctot*, for the appellant.

Geoffrion, Q.C., for the respondent.

[26TH FEBRUARY, 1898.

MACDONALD v. GALIVAN.

Appeal—Jurisdiction—Amount in controversy—Monthly allowance—Future rights—"Other matters and things"—R. S. C. c. 135, s. 29 (b)—56 V. c. 29—Established jurisprudence in Court below.

In an action *en declaration de paternité* the plaintiff claimed an allowance of $15 per month until the child, then aged four years and nine months, should attain the age of ten years, and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The Court below, following the decision in *Lizotte* v. *Descheneau*, 6 Legal News 107, held that,

under ordinary circumstances, such an allowance would cease at the age of fourteen years.

Held, that the *demande* must be understood to be for allowances only up to the time the child should attain the age of fourteen years, and no further, so that, apart from the contingent character of the claim, the *demande* was for less than the sum or value of $2,000, and consequently the case was appealable under the provisions of s. 29 of the Supreme and Exchequer Courts Act; and that, even if an amount or value of more than $2,000 might become involved, under certain contingencies, as a consequence of the judgment of the Court below, no appeal would lie.

Rodier v. *Lapierre,* 21 S. C. R. 69, followed.

Held, also, that the nature of the action and *demande* did not bring the case within the exception as to "future rights" mentioned in the section of the Act above referred to.

O'Dell v. *Gregory,* 24 S. C. R. 661, followed.

Appeal quashed with costs.

A. R. Hall and *Smith,* for the motion.

St. Pierre, Q.C., *contra.*

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ARMOUR, C.J.] [14TH FEBRUARY, 1898.

SEYFANG v. MANN.

Chose in action—Assignment of—Novation—Set-off.

A firm of G. & P., which had contracted with the defendants to supply them with a number of bicycles, was subsequently dissolved, G. retiring, and S. taking his place. The

notice of dissolution stated that the business would be carried on by S. & P., who would pay the indebtedness of the firm, and who were alone authorized to collect its debts, and, by the agreement of dissolution, the partners released each other from all liability, and it was agreed that all the claims of the firm belonged to and would be collected by S. & P. as the owners thereof. The defendants wrote to the new firm notifying them of the contracts they had made with the firm before dissolution, on which they said they had a large claim for damages for non-fulfilment, and trusted the new firm had made this a consideration in the change of the firm; that they were ready at any time to settle up their account, but must first have a settlement of their claim for damages. The plaintiffs, in answer, disputed the defendants' claim for damages, but not on the ground that they, the plaintiffs, had not undertaken to pay the liabilities of the old firm.

Held, that what took place constituted a novation, and the defendants were therefore entitled to claim against the plaintiffs the damages which the defendants had sustained through the breach of the contract; but that such damages must be limited to the damages arising from breaches occurring prior to the dissolution.

Judgment of ARMOUR, C.J., 27 O. R. 631, 16 Occ. N. 264, varied.

Aylesworth, Q.C., and *Hume Cronyn*, for the appellants.

H. D. Gamble and *Hellmuth*, for the respondents.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 29TH APRIL, 1898.

In re REGINA *ex rel.* HALL v. GOWANLOCK.

Prohibition—County Court Judge—Municipal election inquiry—Municipal Act, s. 220, s.-s. 4; s. 227—Proceedings by two relators—Duty of Judge as to second proceeding—Collusion—Jurisdiction.

An appeal by the relator from the order of FERGUSON, J., *ante* 184, prohibiting the senior Judge of the County Court of York from further proceeding to try the validity of the

election of the respondent as an alderman for the city of Toronto, on the ground that prior proceedings had been taken before the Master in Chambers, upon the relation of one Winton, to try the validity of the same election, and that, under s. 227 of the Municipal Act, it was the duty of the County Court Judge to make the second motion returnable before the Master.

Held, STREET, J., dissenting, that s. 220, s.-s. 4, of the Act having given to the County Court Judge, the Master in Chambers, and a Judge of the High Court equal jurisdiction and authority in respect of these matters, no one of them had power to prohibit another; also, that there was no such want of jurisdiction or excess of jurisdiction in the County Court Judge as warranted an order of prohibition or injunction. The County Court Judge had jurisdiction to grant a *fiat*, as he did, for the initiation of proceedings by the relator Hall, and upon the return he had jurisdiction to inquire whether there was a previous motion and before whom it was returnable, and whether it was a real motion or a pretended and a collusive one; if it was the latter, it was no motion at all, and was not made to try the validity of the election.

At most, what was done by the County Court Judge was but error in procedure, and not the subject of prohibition or injunction. The respondent's proper method of proceeding was by a motion before the County Court Judge calling upon both relators to show cause why the second motion should not be made returnable before the Master, upon which motion the question of collusion might have been tried; and this course was still open to the respondent.

Per STREET, J., dissenting:—There is no power in the High Court to prohibit. The absolute duty of the County Court Judge was to make the second motion returnable before the Master; and he had no power to enter upon the question of collusion. The order should not, however, have done more than prohibit the Judge from trying the matter.

Decision of FERGUSON, J., reversed.

DuVernet and *S. B. Woods*, for the appellant.

Marsh, Q.C., and *G. G. S. Lindsey*, for the respondent.

[4TH MAY, 1898.

BANK OF TORONTO v. KEYSTONE FIRE INSURANCE COMPANY.

Trial—Jury notice—Striking out—Duty of Judge presiding at jury sittings—Transfer to non-jury list.

An appeal by the defendants from an order of MEREDITH, C.J., made when presiding at the Toronto jury sittings, striking out the jury notice served by the defendants, and transferring the action for trial to the Toronto non-jury sittings, was allowed, STREET, J., dissenting, and the case was ordered to be reinstated on the list of actions for trial with a jury, and the jury notice restored; but this not to interfere with the right of the Judge presiding at the trial to direct that the action should be tried without a jury; and the costs to be costs in the cause.

Per ARMOUR, C.J.—The Chief Justice of the Common Pleas was not the Judge presiding at the trial of the action within the meaning of s. 110 of the Judicature Act, for he declared as soon as it was called that he would not try it, and then ceased to have any power over it. Nor could the order be supported as one made in Chambers under s. 44 of the Judicature Act, for the order, as issued by the plaintiffs, did not profess to have been made in Chambers, nor did the Chief Justice in making it profess to make it as a Judge sitting in Chambers, nor was any foundation laid for it for an order in Chambers, but the order was made by the Chief Justice *sua sponte*: see *Bull* v. *North British Canadian L. & I. Co.*, 11 P. R. 83. The duty of a Judge presiding at the trial of a cause in which a notice for jury has been given, when he directs that it be tried without a jury, is to proceed at once with the trial of it. The litigants are entitled to have their cause tried in its order upon the docket, and they are the only persons whose convenience ought to be consulted, and neither the convenience of the Judge holding the sittings, nor of the jury, nor of counsel, should be allowed to stand in the way of their right to have their cause tried in its order upon the docket.

Per STREET, J., dissenting:—The Chief Justice was not the Judge presiding at the trial, but he had the power sitting

as a Judge in Chambers to strike out the jury notice and transfer the cause to the non-jury list upon good reason being shown for not proceeding with the trial at once. The case was one in which it was proper to strike out the jury notice, but when it was struck out it did not follow that the case should be transferred to a non-jury list, but the contrary. The case, however, having been transferred to the non-jury list, should remain there, and the appeal be dismissed.

McCarthy, Q.C., and *L. G. McCarthy*, for the defendants.

S. H. Blake, Q.C., and *R. McKay*, for the plaintiffs.

[FERGUSON, ROBERTSON, MEREDITH, JJ., 2ND MAY, 1898.

WRIGHT v. CALVERT.

Costs—Set-off—Interlocutory costs—Rules 1164, 1165—Discretion of taxing officer—Appeal.

An appeal by the defendant Calvert from an order of ROSE, J., in Chambers, allowing an appeal from the ruling of one of the taxing officers at Toronto, and directing a set-off of certain costs awarded to the appellant against the amount of the plaintiff's judgment debt and costs, notwithstanding the assertion of a lien by the solicitor for the appellant.

The plaintiff had recovered judgment in the High Court against two defendants for debt and costs. The plaintiff, after examining the defendant Calvert as a judgment debtor, made a motion for a receiver, which was dismissed without costs, and a motion to commit the defendant Calvert for refusal to answer and for making unsatisfactory answers upon his examination, which was also dismissed without costs. The plaintiff appealed to a Divisional Court, by one appeal, from the orders dismissing these motions, and his appeal was dismissed with costs.

On taxation of the costs of this appeal, the taxing officer was asked to set them off against the plaintiff's judgment debt and costs, but, the defendant Calvert's solicitor asserting a lien on the costs awarded to him, the taxing officer refused to make the set-off.

The motion to ROSE, J., was by way of appeal from the taxing officer's ruling, and also a substantive motion for an order directing a set-off.

Rule 1164 provides that "where a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is liable to pay, and may adjust the same by way of deduction or set-off, or may delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or the officer may allow or certify the costs to be paid, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

Rule 1165: "A set-off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but interlocutory costs in the same action awarded to the adverse party may be deducted.

H. T. Beck, for the defendant Calvert, contended that the costs awarded to him were not interlocutory costs, and, even if they were, the granting of a set-off was in the discretion of the taxing officer, and no appeal from such discretion lay to a Judge in Chambers or other tribunal.

Clute, Q.C., for the plaintiff.

The Court held that the costs were interlocutory costs and a set-off was properly directed by the Judge in Chambers, to whom an appeal lay from the taxing officer's ruling.

The appeal was dismissed with costs, to be fixed by the Registrar.

[6TH MAY, 1898.

In re MONTREAL AND OTTAWA R. W. CO. AND OGILVIE.

Appeal—Award—Railway Act—Forum—Transfer to proper Court—Rule 784.

The proper forum for the hearing of an appeal from an award under the Dominion Railway Act is a Judge in Court.

and not a Divisional Court; the provision of Rule 117 respecting proceedings directed by any statute to be taken before the Court, and in which the decision of the Court is final, is not applicable to an appeal of this kind.

In re Potter and Central Counties R. W. Co., 16 P. R. 16, approved.

Where an appeal was brought in the wrong Court, an order was made under Rule 784 transferring it to the proper Court, upon payment of costs.

W. R. Riddell, for the company.

L. G. McCarthy, for the claimants.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 12TH MAY, 1898.

DAVIDSON v. COCHRANE.

Gift—Money in savings bank—Assignment to infant—Want of notice—Incompleteness.

The decision of BOYD, C., *ante* 183, affirmed on appeal.

Poussette, Q.C., for the appellant.

R. R. Hall, for the judgment creditor.

[BOYD, C., 16TH APRIL, 1898.

MORROW v. LANCASHIRE INS. CO. OF ENGLAND.

Fire insurance—Policy—Assignment—Cancellation—Mortgagee—Subsequent insurance—Double insurance—Proofs of loss.

The plaintiff obtained from the defendants a policy of fire insurance upon his barn for $2,100, and afterwards mortgaged his farm, including the barn, to a loan company for $1,500, assigning the policy to the company as collateral security. The mortgage contained a covenant that the mortgagor would insure the buildings for not less than $1,000; but that the mortgagees might themselves insure the property without any further consent of the mortgagor. Subsequently, without the knowledge or consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance

in another company for $600. The property having been destroyed by fire, the plaintiff notified the company thereof, whereupon they denied liability on the ground that the policy had been cancelled, and on the plaintiff afterwards writing offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, but said nothing as to furnishing proofs of loss.

Held, that the plaintiff did not cease to be the "person insured" within the meaning of the Insurance Act, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act in that behalf.

Held, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of s. 168, s.-s. 8, of R. S. O. c. 203; nor could it be deemed a double insurance as understood in commercial law.

Held, also, that there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss.

George Wilkie, for the plaintiff.

McCarthy, Q.C., and *C. S. MacInnes,* for the defendants.

[ARMOUR, C.J., 28TH APRIL, 1898.

GLANVILLE v. STRACHAN.

Bankruptcy and insolvency—Insolvent debtor—Ranking on estate—Valuing security—Party primarily liable—R. S. O. c. 147, s. 20—Construction of.

By s. 20 of the Assignments Act, R. S. O. c. 147, it is provided that "every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof, and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon."

Held, that this means that if, as between the debtor and the third party, the latter is primarily liable, and the debtor only secondarily liable, the creditor must put a specified value upon his security.

It matters not if, according to the form of the transaction, the debtor and the third party are both apparently

primarily liable to the creditor; if, as between themselves, the third party is primarily liable and the debtor only secondarily liable, the creditor must put a specified value upon his security, for in such case the third party is the party "for whom the debtor is only secondarily liable."

The form of the transaction is not to be looked at, but the substance of it, in order to ascertain whether the third party is the party primarily liable for the claim; and if it be found that he is, the debtor is then only secondarily liable for the claim, within the meaning of the provision.

The reason and object of the provision was to prevent the estate of a debtor being burdened by claims for which the debtor was only secondarily liable, to a greater extent than was necessary for the protection of a creditor, and to augment his estate as much as possible.

In re Turner, 19 Ch. D. 105, referred to.

Shepley, Q.C., for the plaintiff.

Worrell, Q.C., for the defendants.

[STREET, J., 28TH MARCH, 1898.

In re TOWN OF CORNWALL AND CORNWALL WATER-WORKS CO.

Municipal corporations—Arbitration and award—Taking over waterworks—Parties to arbitration—Mortgagees.

The omission to serve notice on the mortgagees of a waterworks company of arbitration proceedings under R. S. O. 1887 c. 164 to determine the amount to be paid by a town corporation for such works and property, and their not being parties thereto, where the amount awarded is less than the amount of the mortgagees' claim, does not entitle the company to have such award referred back, and the mortgagees made parties; for the rights of the mortgagees could not be affected thereby.

Aylesworth, Q.C., and *Cline*, for the company.

Leitch, Q.C., and *E. D. Armour*, Q.C., for the town corporation.

Bruce, Q.C., for the mortgagees.

[16TH APRIL, 1898.

In re GEORGIAN BAY SHIP CANAL AND POWER AQUEDUCT COMPANY.

Company—Winding-up order—Proof of assets—Unpaid stock—Stock issued as paid up—Bonds.

A winding-up order will not be granted where there are no assets, and the petitioning creditor would therefore get nothing by the order: *Re Chapeltown Colliery Co.*, 24 Ch. D. 259.

Where, however, on a petition for such an order, which was contested on the ground of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partly paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted.

Clute, Q.C., for the petitioner.

Aylesworth, Q.C., for the bondholders.

W. N. Ferguson, for the company.

IN CHAMBERS.

[STREET, J., 6TH MAY, 1898.

In re HICKS v. MILLS.

Costs—Scale of—County Court action—Motion to change venue—Appeal.

The costs of an application to the Master in Chambers, under Rule 1219, to change the place of trial in a County Court action should be taxed on the County Court scale, but the costs of an appeal from the Master's order to a Judge in Chambers and of a further appeal to a Divisional Court should be taxed on the High Court scale.

N. F. Davidson, for the plaintiff.

J. H. Moss, for the defendant.

[11TH MAY, 1898.

In re SOLICITOR.

Appeal—Consent order—Denial of consent—R. S. O. c. 51, s. 72.

An appeal by Henry S. Clarkson from an order of the local Judge at Brampton. Clarkson on the 22nd January, 1898, issued a præcipe order for the taxation of certain bills of costs delivered to him by his solicitor. The latter moved before the local Judge to set aside the order, upon the ground that one of the bills had been delivered several years before the order for taxation was made. Upon the return of this motion an order was drawn up, in the nature of a compromise, providing for the taxation of all the solicitor's bills, irrespective of any special agreements for fixed charges, and binding Clarkson not to set up the Statute of Limitations as to any of the items. This order appeared on its face to be a consent order. The appeal was on the ground that Clarkson did not consent to it. No leave to appeal was obtained from the local Judge.

Held, that the appeal could not be entertained: R. S. O. c. 51, s. 72.

T. J. Blain, for the appellant.

J. H. Moss, for the solicitor.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[TOWNSHEND, J., 28TH APRIL, 1898.

MURPHY v. MONASTERY, &c., OF THE PRECIOUS BLOOD.

Will—Legacy—Charitable bequest—Cy-près doctrine—Inquiry.

The testatrix by her last will made the following bequest:

"I direct my executors to expend the sum of $6,000 towards the establishing in Halifax a house of the Nuns of the Precious Blood."

Under the rules of the Roman Catholic church, to which that community belongs, the permission of the head of the diocese must first be obtained before any religious community can be established in any diocese. On application by the above-mentioned Order, whose head-house is in Quebec, to the Archbishop of Halifax for permission to open a house there, the Archbishop, by letter dated the 9th February, 1897, refused to grant permission until he could be assured that the community had such means as would not make them a charge on the parishes.

The executors obtained an originating summons asking for directions.

On the return of the summons *H. T. Jones* appeared for the executors.

D. McNeil and *H. McInnes*, for the residuary legatees, contended that, by reason of the inability of the nuns to obtain the permission of the Archbishop, the legacy had

lapsed into the residue, and that the doctrine of *cy-près* did not apply, citing *In re White's Trusts*, 33 Ch. D. 449.

J. A. Chisholm, for the monastery, contended that the bequest might be applied to the uses of the order elsewhere than in Halifax; that the permission of the Archbishop was not necessary, as the money was to be expended only "towards" the establishment of a house in Halifax; and, in any case, that the bequest should remain in the hands of the executors until further opportunity were given to the nuns to establish themselves in Halifax.

TOWNSHEND, J., was of opinion that there was nothing in the bequest to indicate a general charitable purpose, and the gift having been designated for a particular specified body, the doctrine of *cy-près* did not apply. The nuns had no claim for the use of the money elsewhere than in Halifax, and the permission of the Archbishop being conditional, and there being no sufficient evidence to show that the opening of a house in Halifax was impossible, following *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444, an inquiry should be directed to ascertain whether the direction of the testatrix could be carried out.

Exchequer Court of Canada.

[BURBIDGE, J., 7TH MARCH, 1898.

In re MELCHERS AND DE KUYPER.

Trade-mark—Registration—Refusal to register—R. S. C. c. 63, s. 11—Resemblance between trade-marks.

Upon an application to register a trade-mark:—

Held, that the object of s. 11 of the Act respecting Trade-marks and Industrial Designs, R. S. C. c. 63, as enacted in 54 & 55 V. c. 35, is to prevent the registration of a trade-mark bearing such a resemblance to one already registered as to mislead the public, and to render it possible that goods bearing the trade-mark proposed to be registered may be sold as the goods of the owner of the registered trade-mark.

2. The resemblance between the two trade-marks justifying a refusal by the Minister of Agriculture to register the second trade-mark, or the Court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade-mark to obtain an injunction against the applicant in an action for infringement.

3. It is the duty of the Minister to refuse to register a trade-mark when it is not clear that deception may not result from such registration.

Eno v. *Dunn,* 15 App. Cas. 252, and *In re Dewhurst,* [1896] 2 Ch. 137, referred to.

T. Brousseau, for the applicants.

A. Ferguson, Q.C., and *C. S. Campbell,* for the opposants.

[4TH APRIL, 1898.

YULE v. THE QUEEN.

Constitutional law—8 V. c. 90—B. N. A. Act, 1867, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver.

By an Act of the Province of Canada, 8 V. c. 90, Y. was authorized, at his own expense, to build a toll-bridge, with certain appurtenances, over the river Richelieu, in the parish of St. Joseph de Chambly, Quebec, such bridge and appurtenances to be vested in Y., his heirs, etc., for the term of fifty years from the passing of the Act; and at the end of such term to be vested in the Crown, and free for public use; and it was then to be lawful for Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which it should at that time be worth, exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of whom to be named by the Governor of the Province for the time being, another by Y., his heirs, etc., and the third by the two arbitrators.

The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs maintained the same and collected tolls for the use of the bridge until 1895, when the property became vested in the Crown under the provisions of the Act.

Held, that, upon the vesting of the bridge and its appurtenances in the Crown, the obligation created by the statute to compensate Y. and his heirs, etc., for the value thereof, was, within the meaning of s. 111 of the British North America Act, 1867, a liability of the late Province of Canada existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, was liable.

2. That the Exchequer Court had jurisdiction, under s. 16 (*d*) of the Exchequer Court Act, in respect of a claim based upon such obligation, it having arisen under the provision of the British North America Act, 1867, which, for the purposes of construction of s. 16 of the Exchequer Court Act, was to be considered a law of Canada.

3. That, under the working of 8 V. c. 90, no lien or charge in respect of the value of the property existed against the same in the hands of the Crown.

4. Where both the Governments of Ontario and Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right, praying that a fiat thereon be granted, or, in the alternative, that an arbitrator be appointed by the Crown, and naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the bridge and its appurtenances, as provided in 8 V. c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the circumstances, be held to have been waived by the Crown.

E. Barnard, Q.C., *W. D. Hogg*, Q.C., *E. Lafleur*, and *R. V. Sinclair*, for the suppliants.

Fitzpatrick, Q.C., S.-G., and *E. L. Newcombe*, Q.C., for the Crown.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [10TH MAY, 1898.

STAR LIFE ASSURANCE SOCIETY v. SOUTHGATE.

Judgment—Action on bond—8 & 9 Wm. III. c. 11—Rule 580—Procedure—Penalty—Assessment of damages—Motion for judgment—Rule 593.

In an action upon a bond conditioned for the payment of a sum of money by instalments, with interest in the mean-

time on the unpaid principal, by Rule 580, the provisions of 8 & 9 Wm. III. c. 11 as to the assignment or suggestion of breaches, and as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario; but in all other respects the practice and proceedings are the same as in an ordinary action, and subject to the Rules.

The claim in such an action is not the subject of a special indorsement under Rules 138 and 603, but is in the nature of a claim for damages.

Upon the defendant in such an action making default in delivering a defence, judgment is to be obtained by the plaintiff by motion under Rule 593, and should be for the penalty, and for assessment of damages for the breaches assigned or to be suggested in such way as may be thought proper under Rules 578, 579.

Where the action comes for assessment of damages before a Judge sitting for the trial of actions, he can do no more than assess the damages in respect of the breaches of the bond for which execution is to be issued.

Shepley, Q.C., *G. C. Campbell*, and *Frank Denton*, for the appellants.

Ludwig, for the respondents.

LEWIS v. DOERLE.

Will—Charitable devise—Trust for benefit of citizens of the United States of African descent.

A devise of lands in Ontario, by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights," is a charitable devise, and void, and the fact that the trust is to be executed in a foreign country makes no difference.

Judgment of BOYD, C., 28 O. R. 412, 17 Occ. N. 187, affirmed.

W. Barwick, for the appellants.

W. Cassels, Q.C., for the respondent.

RICE v. TOWN OF WHITBY.

Municipal corporations—Highways—Obstruction—Notice—Liability.

A house which was being moved from one part of a town to another was allowed to stand over night upon one of the streets without a watchman or warning light. The plaintiff's horse, while being driven past the house that night, took fright, and the plaintiff was injured. Some of the town councillors knew that the house was to be moved and that it had been left standing upon the street for the night.

Held, assuming that the house was an obstruction to the highway, that there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation.

Judgment of BOYD, C., 28 O. R. 598, 17 Occ. N. 378, reversed.

C. J. Holman, for the appellant the third party.

Aylesworth, Q.C., and *Farewell*, Q.C., for the appellants the town corporation.

W. R. Riddell, for the respondent, the plaintiff.

MEREDITH, C.J.] [17TH MAY, 1898.

CROSS v. DAVIDSON.

Distress for rent—Goods in custodia legis—Division Court execution—Bailiff's man in charge—Voluntary withdrawal.

The judgment of MEREDITH, C.J., 17 Occ. N. 189, affirmed.

D. O. Cameron, for the appellant.

W. Nesbitt and *W. H. Hunter*, for the respondent.

FERGUSON, J.] [10TH MAY, 1898.

RAINVILLE v. GRAND TRUNK R. W. CO.

Railways—Negligence—Fire caused by sparks from engine—Cutting down weeds.

A railway company is responsible for damages caused by fire which is started by sparks from one of their engines, in

dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation.

Judgment of FERGUSON, J., 28 O. R. 625, 17 Occ. N. 379, affirmed.

Osler, Q.C., for the appellants.

M. K. Cowan, for the respondent.

ROSE, J.]

WILSON v. LYMAN.

Trade-mark—Infringement—Use of particular word in advertising.

Judgment of ROSE, J., 17 Occ. N. 258, affirmed.

S. H. Blake, Q.C., and *J. J. Scott*, for the appellants.

D. E. Thomson, Q.C., and *D. Henderson*, for the respondents.

DRAKE v. SAULT STE. MARIE PULP AND PAPER CO.

Water and watercourses—Interference with navigation—Private right of action.

The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of, a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to his fishing grounds in the lake, and was also sometimes employed by neighbours to bring to them in this sail boat supplies and provisions. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that for the whole summer access to the stream was cut off.

Held, that the plaintiff had sufficient special interest to enable him to maintain an action for damages.

Judgment of ROSE, J., affirmed.

Wallace Nesbitt, for the appellants.

A. C. Macdonell, for the respondent.

McMILLAN v. MUNRO.

Registry laws—Priorities—Mortgage for balance of purchase money—Estoppel.

The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash, and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser. The mortgage was delivered to the vendor's agent to be registered. The purchaser had obtained the cash payment from the defendant upon the security of a first mortgage upon the land in question, and this mortgage was prepared, executed, and delivered before the execution and delivery of the deed, and was registered before the deed and before the mortgage to the plaintiff. Upon receiving the deed, the purchaser handed it to the defendant's agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith and each without knowledge or notice of the other's mortgage.

Held, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel, and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the claim of the plaintiff for the balance of purchase money; and that the plaintiff's mortgage was therefore entitled to priority.

Nevitt v. *McMurray*, 14 A. R. 126, applied.

Judgment of ROSE, J., reversed.

E. H. Tiffany, for the appellant.

A. C Macdonell, for the respondent.

ROBERTSON, J.]

WARD v. WILBUR.

Vendor's lien—Performance of agreement—Tenants in common.

A lien in the nature of a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited to cases of conveyance for a money consideration.

Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant.

Judgment of ROBERTSON, J., affirmed.

J. M. Glenn and *W. Gundy*, for the appellants.

J. A. Robinson, for the respondent.

FALCONBRIDGE, J.]

POWELL v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Railways—Lands injuriously affected—Operation of the railway—Dominion Railway Act, 51 V. c. 29.

Under the Dominion Railway Act, 51 V. c. 29, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself, and not on personal inconvenience or discomfort to the owner or occupant.

It was *held*, therefore, that no compensation could be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so far as that resulted from the passing of trains.

Re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 28 O. R. 468, considered.

Judgment of FALCONBRIDGE, J., affirmed.

Robinson, Q.C., and *James Chisholm*, for the appellant.

Osler, Q.C., and *D'Arcy Tate*, for the respondents the railway company.

Mackelcan, Q.C., for the respondents the corporation of the city of Hamilton.

STREET, J.]

MOORHOUSE v. KIDD.

Principal and surety—Counter-security—Right to enforce—Depreciation—Failure to realize—Contribution between co-sureties.

Where the principal debtor gives to his sureties counter-security by mortgage of real estate, and one of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety, who has paid the whole debt, that the security has depreciated in value, and that the paying surety has refused to take any steps to enforce it.

Judgment of STREET, J., 28 O. R. 35, 16 Occ. N. 351, affirmed.

McCarthy, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent.

In re CURRY, CURRY v. CURRY.

Improvements on land—Tenants in common—Allowances—Interest—Practice—Master's office—Accounts.

A tenant in common, who holds possession of and manages the common property, is entitled, when called on for an account by his co-tenant, to his proper and reasonable expenditures for repairs and improvements, with interest from the time the expenditures are made.

Judgment of STREET, J., affirmed.

Where accounts are brought into the Master's Office, with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved.

Judgment of STREET, J., 17 P. R. 379, 17 Occ. N. 122, affirmed.

McCarthy, Q.C., and *O. E. Fleming*, for the appellants.

S. H. Blake, Q.C., and *R. F. Sutherland*, for the respondents.

DRAINAGE REFEREE.]

THACKERAY v. TOWNSHIP OF RALEIGH.

Drainage—Lands injuriously affected—Appeal to Court of Revision—Claim for damages—Sufficiency of notice—Filing notice—Arbitration—Statute.

Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work, and who is assessed for part of the cost, is not bound to appeal to the Court of Revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration or action.

Whether such a claim is made by application for arbitration or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it.

The provision of s.-s. 3 of s. 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited, but a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference, because of the drain, with access to part of the claimant's farm.

Judgment of the Drainage Referee affirmed.

M. Wilson, Q.C., for the appellants.

W. Douglas, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

[FERGUSON, ROBERTSON, MEREDITH, JJ., 6TH MAY, 1898.

REGINA v. EDWARDS.

Criminal law—Indictment for rape—Conviction of common assault—Time within which complaint laid—Criminal Code, s. 841.

Notwithstanding the provisions of s. 841 of the Criminal Code, a prisoner indicted for rape may be found guilty of

common assault, although the complaint was not made or information laid within six months from the time when the matter of complaint or information arose.

J. R. Cartwright, Q.C., for the Crown.

Faulds, for the prisoner.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 11TH MAY, 1898.

RONDOT v. MONETARY TIMES PRINTING CO.

Costs—Taxation—Depositions not used at trial—Counsel fee—Quantum—Review.

In an action for libel the defendants, in support of their defence of justification, obtained a commission, and had the evidence of certain witnesses out of the jurisdiction taken thereunder for use at the trial. The evidence, however, was not used at the trial, owing to the plaintiff being called as a witness by the defendants, and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

Held, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against the plaintiff the costs of executing the commission, the taking of it having been, under the circumstances, not unreasonable, and the fact that it was not used not being sufficient to deprive the defendants of the costs of it.

The practice is not to interfere upon appeal with the discretion of a taxing officer as to the quantum of a counsel fee.

Swabey, for the plaintiff.

King, Q.C., for the defendants.

[25TH MAY, 1898.

EWING v. CITY OF TORONTO.

Costs—Third party—Dismissal of action—Discretion of trial Judge—Appeal.

Where a third party has been brought into an action by the defendant, and an order has been obtained by the defendant directing that the question of indemnity as between the third party and the defendant be tried after the trial of

the action, and that the third party be at liberty to appear at the trial of the action and oppose the plaintiff's claim, so far as the third party is affected thereby, and at the trial the action is dismissed :—

Semble, that the third party is entitled against the defendant to costs up to and inclusive of the trial.

Held, however, that the disposition of such costs is in the discretion of the trial Judge, whose order, by R. S. O. c. 51, s. 72, is not subject to appeal without leave.

Held, also, that the third party can not be heard in a Divisional Court upon an appeal by the plaintiff from the judgment at the trial, and is entitled to no costs of such appeal.

G. A. Kingston, for the third party.

Fullerton, Q.C., for the defendants.

[Boyd, C., 20th and 27th May, 1898.

NEVILLS v. BALLARD.

Solicitor—Charging order—Infant plaintiff—Action for personal injuries—Lien on taxed costs—Sale of judgment.

An application by the solicitor for the infant plaintiff, under Rule 1129, for an order charging the amount of the judgment recovered by the plaintiff against the defendant with the costs incurred by the applicant as between solicitor and client.

Held, that by Rule 1129 a discretionary power is given to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court, in the exercise of its discretion, to make the charge: *Re Humphreys,* [1898] 1 Ch. 526.

The Rule gives the solicitor an ancillary right—one not intended to displace the liability of the client to pay the solicitor out of his own pocket, but ancillary to his right to be paid on his retainer: *Groom* v. *Cheesewright,* [1895] 1 Ch. 730.

Here the retainer was given by the father of the infant, and the infant plaintiff was not liable to the solicitor for any

of the costs. It was just that the costs taxed against the opposite party by virtue of the solicitor's exertions should be charged or impounded to answer the solicitor's lien. But beyond this, in the case of actions grounded on personal injuries to infants, the Court ought not to go.

Order made directing that the judgment should stand charged to the extent of the taxed costs in favour of the solicitor, and enjoining the infant and next friend from receiving or disposing of the same.

Direction that charge be enforced by sale of judgment refused.

No costs of the application.

Mulvey, for the applicant.

John Hoskin, Q.C., for the infant plaintiff.

[ROSE, J., 1ST APRIL, 1898.

SINCLAIR v. BROWN.

Distribution of estates—Widow's charge—Foreign estate—R. S. O. c. 127, s. 12.

Under the Intestates' Estates Act, 58 V. c. 21, now s. 12 of the Devolution of Estates Act, R. S. O. c. 127, the widow of a person dying intestate, and leaving no issue, is entitled to $1,000 out of his estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

A. F. Lobb, for the plaintiff.

George W. Lount, for the defendants.

IN CHAMBERS.

[BOYD, C., 20TH MAY, 1898.

In re BENNINGTON.

Devolution of Estates Act—Executors and administrators—Power to mortgage lands—Consent of official guardian.

John Hoskin, Q.C., as official guardian, applied under Rule 972 for an order or direction touching certain real estate

in which infants were interested, the question being whether executors or administrators had power under s. 9 of the Devolution of Estates Act, R. S. O. c. 127, with the consent of the official guardian, to mortgage the lands in question.

THE CHANCELLOR held that executors or administrators had such power with such consent.

[25TH MAY, 1898.

DAVIDSON v. MERRITTON WOOD AND PULP CO.

Settlement of action—Validity of—Trial—Issue—Action—Pleading.

An assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid.

Held, that it was not necessary to bring another action to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue.

Rees v. *Carruthers,* 17 P. R. 51, distinguished.

Johnson v. *Grand Trunk R. W. Co.,* 25 O. R. 64, and *Haist* v. *Grand Trunk R. W. Co.,* 22 A. R. 504, followed.

S. B. Woods, for the applicant.

R. McKay, for the defendants.

[STREET, J., 1ST APRIL, 1898.

TOWNSEND v. O'KEEFE.

Pleading—Slander—Particulars—Names of persons—Times and places—Striking out—Amendment.

In an action of slander the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added, "and to others at present unknown to the plaintiff."

Held, sufficient.

It also alleged that during a period of five months the defendant spoke and published various slanders to certain named persons and to others not known to the plaintiff.

Held, bad, and struck out; for it did not show which of the persons mentioned were present when the different statements were made, nor at what times and places they were made.

Leave to the plaintiff to amend by adding further charges within reasonable limits.

Thurston, for the plaintiff.

W. H. Lockhart Gordon, for the defendant.

[MEREDITH, J., 21ST MARCH, 1898.

ORFORD v. FLEMING.

Solicitor— Charging order— Form of.

In this case, noted *ante* 142, the order, as drawn up and settled, contained no provision for the sale of the judgment charged with the costs of the plaintiff's solicitors.

The order was issued in the following form:—

1. It is ordered and declared that the applicants are entitled to a charge on the judgment debt or sum mentioned in the notice of motion, and recovered in this action by judgment bearing date . . . for the taxed costs, charges, and expenses of the said applicants, of or in reference to such suit, as solicitors for the plaintiff, including the costs of and incidental to this application.

2. And it is further ordered that it be referred to one of the taxing officers to tax such costs as between solicitor and client, including the costs of and incidental to this application.

(It appears to have been contemplated that another application should be made after the taxation, if necessary, for an order to enforce the charge.)

W. R. P. Parker, for the applicants.

Coatsworth, contra.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH JANUARY, 1898.

MARTIN v. MARTIN.

Partnership—Agreement—Construction—Whether persons partners inter se.

M. carried on business, and had in his employ his sons, J., R., and A. An agreement was entered into between them by which the sons were to be associated with the father for a term of five years as co-partners in carrying on the business, which was to be under the name and style of W. M. & Sons. The father was to furnish the capital and stock in trade, and the sons were to work in their several departments in carrying on the business. J. was to have charge of the books of the business, and power in the absence of the father to sign the firm name, and also in the absence of the father was to have general charge of the business. R. and A. were to be under the directions of the father. The agreement witnessed that each of the sons should accept from the father "out of the proceeds of the business, as their and each of their several interests in the business, on account of the services to be performed by each of them," a specified sum of money each year,

and which the father covenanted to pay to them "on account of their several interests in the business." Provision was made for the withdrawal of the sons or either of them "from the said firm," on giving notice to the father, upon which the account with the firm of the party giving such notice should be made up, and the balance due him paid when all his interest in the business should cease. It was further agreed that at the end of the term of five years the several accounts of the sons should be balanced and the money found to be due to each of them paid, whereupon the agreement should terminate. The sons were prohibited from entering into any contract on behalf of the firm involving more than $10, or engaging in any transaction out of the usual course of the retail business, and the wish of the father in all matters respecting the management of the business was to be binding on the sons. In the books of the business, kept by J., and accessible to the sons, an account was opened against each of the sons, in which they were charged the cash paid to them and were credited as salaries the amounts which by the agreement they were to be paid each year. Stock was never taken, and no steps taken to ascertain the profits or losses of the business.

Held, that the sons were not partners *inter se*.

A. I. Trueman, for the plaintiff.

C. N. Skinner, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 21ST JUNE, 1898.

REGINA v. GIBBONS.

Criminal law—Endeavour to obtain money by menaces—Criminal Code, s. 404—Evidence.

Reserved case. The prisoner was arraigned upon an indictment charging him with having unlawfully demanded

for himself, with menaces, from one Bernhardt, the sum of $75, with intent to steal the same. He pleaded not guilty, and was tried before TAYLOR, C.J., who found him guilty.

The prosecutor kept an hotel, and stated in his evidence that the prisoner came to him and told him he was going to "pull" him, and wanted some money from him; that he had seen the license inspector and told him all about it; and he wanted $75 from the prosecutor; he said he did not want to take the prosecutor to Court, but he wanted the money for a ticket and to start business where he was going; the prosecutor said he would see about it. The prisoner went away, but returned and told the prosecutor he must have the money to go away with. The prosecutor said to him, "You would not mind taking $30? $75 is too much." Prisoner said, no, he must have $75, and he wanted it in a short time. He returned again and said the other hotel keepers were all satisfied; the prosecutor then told him he could not get $75 from him. In the afternoon the prisoner came again and told the prosecutor he did not want to take him to Court, but he wanted money; he said he was in the bar-room on Sunday and bought a flask of whisky; he had also got liquor on election day. The prosecutor subsequently went to the license inspector, who had the prisoner arrested. The prosecutor admitted he had previously been convicted of a violation of the Liquor License Act.

Without passing sentence upon the prisoner, TAYLOR, C.J., remanded him to gaol in order to obtain the opinion of the Court upon the following question:—

"Do the facts established by the evidence taken at said trial constitute a demand of money, with menaces, with intent to steal said money, within the meaning of s. 404 of the Criminal Code?"

Held, that the question should be answered in the affimative and the conviction affirmed.

As the complainant had already been convicted under the Liquor License Act, the consequences of a second conviction would have been extremely serious to him.

The threat, under the circumstances, was certainly "such as would be likely to affect any man in a sound and healthy

state of mind:" *Regina* v. *Smith*, 4 Cox C. C. 42. The prisoner knew it, and the prosecutor was so far affected that he offered him $30 to abstain from laying the charge against him.

The intent to steal must be presumed from the circumstances of the case, and it was a question entirely for the jury to determine.

The trial was had before TAYLOR, C.J., who, acting as a jury, found the prisoner guilty, and his finding was certainly supported by the evidence.

Any menace or threat that comes within the sense of the word "menace," in its ordinary meaning, proved to have been made with the intent of stealing the thing demanded, would bring the case within the section.

Maclean, for the Crown.

[KILLAM, J., 25TH APRIL, 1898.

NICHOLL v. GOCHER.

Married woman —Liability of—Separate estate—Husband employed in business as clerk.

The plaintiff sued the defendant, a married woman, for wages as a farm labourer in her employ, for money lent to her or paid for her at her request, for money collected by her for him, and for the price of animals sold by him to her. The statement of claim alleged that "the defendant is a married woman, lately operating a farm in Souris, in the Province of Manitoba." There was no allegation that she was possessed of separate estate. The defendant's counsel treated the allegation cited as an allegation that she was carrying on the farming operations as her separate business, and no objection was made to the want of an allegation that the debts were contracted by her in the course of that business, so as to render her liable under the principles of *Wishart* v. *McManus*, 1 Man. L. R. 213; and *Velie* v. *Rutherford*, 8 Man. L. R. 168, 12 Occ. N. 330.

A banking business was opened as the defendant's business under the name of Gocher & Co.; subsequently it was arranged that the defendant's husband should buy a farm for her, which was done. The bank and the farming operations were carried on by the wife as one business. The husband was employed as a clerk in the banking business; it did not appear that he had any fixed salary, or what was the arrangement between him and his wife. The negotiations for the employment of the plaintiff were conducted by the husband, though partly in the wife's presence. It was the husband who was consulted by the plaintiff on all matters of importance relating to bank or farm, though at times in the wife's presence. The husband acted as bookkeeper, and he gave the wife the benefit of his advice and assistance.

Held, that the business was carried on by the defendant separately from her husband, and that she was liable.

If this were a case in which the wife was claiming the profits or proceeds of the bank, or the farm, as against the husband's creditors, it would be impossible to hold it sufficiently proved that the business was *bona fide* intended to be that of the wife alone; as against her, it was easier to draw the inference of fact. An outsider contracting with the wife could not be presumed to have the same knowledge of all the facts or be justly held to as strict proof. It must be found as a fact, as between the husband and wife, that the business was intended to be, and was in fact, conducted to the wife's separate use. It is dependent upon the circumstances of each case what is the degree or nature of the participation by the husband which prevents the finding of a separate business.

Merchants Bank v. *Carley*, 8 Man. L. R. 258, 12 Occ. N. 335, and *Goggin* v. *Kidd*, 10 Man. L. R. 448, 15 Occ. N. 189, distinguished.

Verdict for the plaintiff with costs.

Bonnar, for the plaintiff

Phippen and *Dubuc*, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 26TH MARCH, 1898.

In re WEST HURON PROVINCIAL ELECTION.

Parliamentary elections—Recount of ballots—Initials of poll-clerk, instead of deputy returning officer—Mutilation of ballot—Material part missing—Presumption—Words written on ballot—Presumption.

An appeal by J. T. Garrow and a cross-appeal by Joseph Beck from the decision of the Judge of the County Court of Huron upon a recount of the ballots cast at the election.

By the County Court Judge's recount 2,465 ballots were cast for Beck, and 2,463 for Garrow. At the hearing of the appeal, on the 23rd March, 1898, the County Court Judge's recount was affirmed as to most of the ballots in question.

Upon Garrow's appeal judgment was reserved as to two ballots:—

1. A ballot cast at polling place No. 3, West Wawanosh, properly marked for Garrow, but rejected by the County Court Judge because not initialled by the deputy returning officer. The initials on the back were those of the poll clerk. It was the only ballot counted at that place which was not initialled by the deputy, and the supposition was that it had been initialled by the clerk in the temporary absence of the deputy.

Held, that, as the whole number of ballots counted agreed with the number of names of persons marked in the

poll-book as having received ballots, the absence of the initials of the deputy was not a ground for rejection, and the ballot was not invalidated by the initials "C. S." on the back, a comparison of the handwriting in the official signatures of the poll-clerk showing that the initials were in his writing; and therefore this ballot must be counted.

2. A ballot cast at polling-place No. 8, Ashfield, marked and counted for Beck, from which a strip having the official number upon it was torn off and missing.

Held, that the presumption was that it was mutilated by the voter; an integral part of the ballot having been removed, the remainder ceased to be a ballot, and should not have been counted.

Upon Beck's appeal judgment was reserved as to three ballots :—

1. A ballot cast at polling-place No. 1, Colborne, marked for Beck, but with the word "vote" written after the candidate's name.

2. A ballot cast at polling-place No. 2, Goderich, marked for Beck, but with the word "Jos" written before the candidate's name.

3. A ballot cast at polling-place No. 3, Ashfield, marked for Beck, but with the words "for Beck" written on the back.

Held, that these ballots were all properly disallowed by the County Court Judge, the presumption being that the words were written by the voters, who had thus spoilt their ballots.

The result was that the same number of votes had been cast for each candidate.

Aylesworth, Q.C., for Garrow.

Wallace Nesbitt, *Masten*, and *W. D. McPherson*, for Beck.

[MACLENNAN, J.A., 12TH APRIL, 1889.

In re WEST ELGIN PROVINCIAL ELECTION.

Parliamentary elections—Recount of ballots—Ballots marked in wrong division of paper—Mutilation of ballot—Presumption—Ballots marked for both candidates—Ballots with additional marks—Words written on ballots—Presumption—Imperfect crosses—Spoiled ballot.

Appeal and cross-appeal from a recount of votes by ERMATINGER, Co.J., argued before MACLENNAN, J.A., on the 19th March, 1898.

E. F. B. Johnston, Q.C., and *Aylesworth*, Q.C., for Donald MacNish.

T. W. Crothers and *Wallace Nesbitt*, for Finlay G. McDiarmid.

MACLENNAN, J.A.—The learned County Judge found the votes duly cast for the two candidates to be equal. His decision with respect to forty-seven votes was objected to before me. Twenty of these depend on the same question. The form of ballot used was identical with that in the schedule of the Election Act, except that a scroll about one-eighth of an inch wide was used instead of the plain lines running from left to right in the form. The upright lines separating the numbers from the names were thin, plain lines, similar to those in the form, and bore the same colours as the names of the candidates respectively. Fifteen of these twenty ballots were marked in the division containing McDiarmid's number, to the left of the line separating the numbers from the name, and the other five were similarly marked in the division containing MacNish's number. They were all counted by the learned Judge, and his decision is objected to on behalf of MacNish. The ground of objection is that, not being marked in the division containing the name, they are void, as not complying with s. 103 of the Act, which directs that the cross be placed by the voter on the right hand side, opposite the name of the candidate for whom he desires to vote, or at any other place within the division which contains the name of such candidate.

The question does not concern the right to vote, but only the proper method of doing so. The Legislature has given

certain directions for marking the ballot. They are intended for all classes of voters, including some who are not accustomed to the use of paper and pencil, and some who are dull and unintelligent, and yet who have as good a right to vote as the most intelligent. Therefore, if a ballot is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act according to any fair and reasonable construction of it, the vote ought to be allowed. I think that is the result of the authorities, both here and in England: *Cirencester*, 4 O'M. & H. 196; *Woodward* v. *Sarsons*, L. R. 10 C. P. 733; *Thornbury*, 16 Q. B. D. 739; *Phillips* v. *Goff*, 17 Q. B. D. 805; *North Victoria*, H. E. C. at p. 680; *Bothwell*, 8 S. C. R. 676.

In the present case the question is whether twenty persons who had an undoubted right to vote, and who desired and intended and endeavoured to do so, have nevertheless failed in their attempt. There are two methods of marking the ballot allowed by s. 103. The cross may be placed at the right-hand side, opposite to the name of the candidate intended to be voted for, or it may be placed in any other place within the division containing his name. These are really not two alternative methods, because the second method includes the first. Are these ballots marked within the division containing a candidate's name? If we say, looking at the ballot which was here used, that the name of the candidate is in one division and his number in another, then these marks are not in the division containing the name, but in that containing the number. But I think it clear that these are not the divisions intended by the statute. The dividing line between the name and the number is not essential. There is no need whatever for a separating line between a candidate's name and his number, and the ballot would be perfectly good without it. Section 69, s.-s. 2, requires the names to be arranged alphabetically on the ballot, and s.-s. 3 directs the number and name of each to be printed in ink of different colours. Therefore, the number is something belonging to the candidate, and not something distinct. There is no direction where the number is to be placed, and it might be placed anywhere near the name, before or

after it, or above or under it. It is different with the names of the candidates. They must be separated from each other. Each must have a separate part of the ballot paper for itself, and must therefore be in a separate division. Accordingly, we find the form in the schedule divided by lines drawn from right to left, with as many divisions as there are candidates. I think these are the divisions intended by the statute, and that the divisions containing the numbers are mere subdivisions of the divisions containing the names. In other words, it is the same division of the ballot paper which contains each candidate's name and number. It would be a strange construction of the statute which would hold that, on a ballot from which the immaterial and useless upright lines were omitted, a cross near the number or even to the left of it would be good, as it clearly would be, but that on a ballot containing those lines a cross so placed would be bad; and yet, a ballot in either form would be good, and might be used with propriety in either election. I think a construction leading to such a result ought not to be adopted, if it can be avoided. In my opinion, there is a very plain sense in which, notwithstanding the upright line, the space containing the number may be regarded as a part of the division of the ballot containing the candidate's name, and therefore I am bound to hold that it is so, and to affirm the validity of ballots marked within that space. I therefore think the learned Judge's decision was quite right, and that those twenty votes were properly allowed and counted by him.

There is another ballot, No. 117, which was rejected both by the deputy returning officer and by the learned Judge, presumably on account of having a considerable portion of the blank part on the right-hand side removed, a section of equal width from top to bottom, and about three-tenths of the whole width of the original paper. The part removed had none of the printed matter of the ballot upon it, except perhaps a portion of the lines from left to right separating the names of the candidates. In other respects this ballot is perfect, and properly marked for McDiarmid. The argument which was strongly urged against its allowance was that the voter might carry away with him the part removed, and use it to show that he had voted for McDiarmid. I

have hesitated a great deal over this ballot, but, upon the whole, I do not think there is anything in the Act requiring me to reject it. Section 112 (3) requires ballots to be rejected on which anything in addition to the printed number and the deputy returning officer's name or initials is written or marked, by which the voter can be identified. There is nothing of that kind here, and I do not feel at liberty to extend the language of the Legislature so as to include such a case as this within the prohibition, and thereby to disfranchise the voter, who has in every respect marked his ballot distinctly and properly: *Thornbury*, 16 Q. B. D. at p. 753. Section 103 requires the voter to mark and to fold and to return to the deputy returning officer the very ballot paper which has been given to him, and by s. 105 no person who has received one is to take it away out of the polling place. It might be argued that he is required to return the whole ballot paper, and not merely a part of it, and that the prohibition of taking it away extends to every part of the paper. It may perhaps be inferred from the fact that the deputy returning officer refused to count the vote, that he did so because he knew he had not given out any ballot paper so much smaller than all the others as this, and therefore that it was the voter who had torn or cut a piece off it. But for that, it would be an assumption that there had been any part removed, or, if there had, that it had been done by the voter, or that it had not been in that condition when given to him. It is still a perfect ballot, properly marked, and it is only by comparison with the other ballot papers that the inference can be drawn that any part of it had been removed. Now, s. 109 seems to be very material to this question. That provides for the case of a voter spoiling his paper, and it is only when it has been dealt with so "that it cannot be conveniently used as a ballot paper" that it is spoiled, and ought to be delivered up and a new one procured. This voter may by inadvertence have marked it wrongly in the first place, and, immediately perceiving that, may have torn or cut off the margin on which he had placed his mark. He then finds that it can still be conveniently used as a ballot paper, and he does make use of it. I think s. 109 warrants the conclusion that he might do so. This ballot is not like that which

was before my brother Osler in the *West Huron* case, in which a part was torn off, and which was disallowed by him. In that case the part torn off was an essential part of the ballot paper, namely, that on which the printed number had been. I think the proper conclusion is that this ballot ought not to have been rejected, and ought to be counted for McDiarmid.

Eight ballots were questioned which appeared to be marked for both candidates, Nos. 38, 7070, 8573, 8412, 8509, 8560, 8566, and 8468. The learned Judge rejected the first seven as void, and allowed the last for McDiarmid, and I think he was right as to all but the last, and as to them I affirm his decision. But I think he ought to have disallowed No. 8468 as well as the others, and for the same reason. No. 8519 was marked on the back over MacNish's name. I think it was rightly disallowed: *Wentworth*, H. E. C. 536.

Nine ballots were questioned as having other marks thereon besides the proper cross. These were Nos. 732, 3484, 3946, 4858, 5350, 6564, 7735, 8608, and 8491. I think 732 was properly allowed for MacNish. 3484 was well marked for McDiarmid, whose name was uppermost on the paper, and there were, besides the proper mark, two other small crosses near the upper margin of the paper, outside of the line. It was disallowed by the learned Judge, but I think that was wrong, and that it should be allowed for McDiarmid. Nos. 3946 and 4858 were both marked for McDiarmid, but there was a straight stroke on MacNish's division. The learned Judge disallowed them, but, I think, wrongly. They should be allowed for McDiarmid. No. 5350 was well marked for MacNish, but in McDiarmid's field there was also a cross, but carefully obliterated with a pencil. I think it was rightly allowed for MacNish by the learned Judge. 6564 and 7735 were allowed, the first for McDiarmid and the other for MacNish, and I think rightly. No. 8508 was well marked for McDiarmid, but with two obscure lines opposite to MacNish's name, lying very close together, almost coincident. It was counted by the deputy returning officer, but rejected by the learned Judge. I cannot say the lines do not cross each other, and therefore I cannot disturb his finding. Number

8491 is like the last in every respect, and was rejected both by the deputy returning officer and the learned Judge. I cannot say they were wrong.

Four ballots were questioned for having names or initials upon them other than those of the deputy returning officer. Number 1306 has the name MacNish on the face, in pencil, in that candidate's division, as well as a proper cross. It was rejected by the learned Judge. I think it should have been allowed. I am unable to see how the voter could (not might possibly) thereby be identified : *Cirencester*, 4 O'M. & H. 196, per Hawkins, J.

Number 7369 was well marked for MacNish, but had the words " Mr. MacNish, West Elgin," in pencil, on the back. I think it was properly allowed by the learned Judge.

No. 7509 was properly marked for MacNish, and had the initials " D. F." on the back, as well as those of the deputy returning officer. It was allowed by both the deputy returning officer and the learned Judge, and I think rightly.

No. 7582 was properly marked for McDiarmid, but had the name " John Cains," in pencil, on the back, besides the initials of the deputy returning officer. It was rejected both by the deputy returning officer and the learned Judge. It may have been because there was a voter of that name on the list. I cannot say it was not rightly rejected.

There were three cases of alleged imperfect and doubtful crosses. Of these 5867 and 7165 were, I think, rightly allowed for MacNish. The first was a sprawling sort of a cross, but a cross nevertheless. The other was a cross, one of the lines being indistinct at and for a very short distance on both sides of the intersection, but still quite visible.

No. 6145 was an unusually large cross, the arms extending into McDiarmid's field, but the intersection wholly within MacNish's division. It was rejected both by the deputy returning officer and the learned Judge. I think it should have been counted for MacNish.

The remaining ballot is No. 8176. The learned Judge thinks this ballot was found in the spoiled ballots' envelope, but he says that, looking at the ballot paper account and all the documents which were before him, he thinks it was placed

in a wrong envelope by mistake, and he allowed it. It is well marked for McDiarmid, but it is like number 5350 mentioned above in having a cross in MacNish's field with evident obliteration marks over it. I think the learned Judge rightly allowed it, if it was not a spoiled ballot. I have no means of reviewing his conclusion that it was not a spoiled ballot, inasmuch as, this appeal being a limited one, the Act does not authorize the transmission to me of anything but the ballot papers which are the subject of appeal, together with a notice of appeal and a certificate of the learned Judge's finding.

The result is that I allow for McDiarmid the following ballots which had been rejected by the learned Judge: Nos. 117, 3484, 3946, and 4858. I disallow No. 8468, which had been counted for him, whereby three votes are added to his poll.

I allow for MacNish numbers 6145 and 1306, which the learned Judge had rejected, which adds two to his poll, and the conclusion of the whole matter is that Mr. McDiarmid has a majority of one.

I think there should be no costs of the appeal.

In re SOUTH PERTH PROVINCIAL ELECTION.

Parliamentary elections—Recount of ballots—Ballots numbered on back by deputy returning officer—Ballots marked in wrong division of paper—Fault in printing of paper—Name of candidate above line—Ambiguity of mark.

Appeal and cross-appeal from a recount of votes before BARRON, Co.J., argued before MACLENNAN, J.A., on the 26th March, 1898.

Idington, Q.C., for Moscrip.

Wallace Nesbitt and *F. H. Thompson*, for Monteith.

MACLENNAN, J.A.—There were 112 particular ballots objected to before the learned Judge, 29 by Monteith and 83 by Moscrip. Objection was also made on behalf of Mr. Monteith to all the ballots cast at polling sub-divisions No. 3, Downie, and No. 3, Hibbert. The same ballots were all included in the appeal before me.

The objection to the ballots cast at No. 3, Downie, and No. 3, Hibbert, was that a number had been placed on the back of each ballot by the deputy returning officer, in pencil. The learned Judge disallowed the objection, and I think he was clearly right in doing so, inasmuch as s. 112 (3) expressly provides that "no word or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper shall avoid the same."

The objection to a good many of the other ballots is that the cross is marked in the division at the left hand side, containing the candidate's number, and not in the division containing his name. I have given reasons in the West Elgin case for holding all such votes good, and I need not repeat them here. The learned Judge allowed that class of votes, and I affirm his decision.

I have examined each one of the whole 112 ballots which were questioned and specially passed upon by the learned Judge, and I agree with his decision thereon in each case, and generally with his reasons, with the exception of 14 ballots allowed for Monteith, and with regard to which, with great respect, I have been unable to come to the same conclusion. These are the numbers: 739, 741, 1298, St. Mary's; 2012, 2752, Blanchard; 4192, Downie; 7655, 8862, 8858, Logan; 6875, 7504, 7513, Mitchell; 5710, Hibbert; 5230, Fullerton. I find myself obliged to come to the conclusion that all these ballots are either marked for the candidate Frame, or are void for uncertainty, and so cannot be counted for Monteith, as they have been by the learned Judge.

The difficulty is occasioned by a fault in the printing of the ballot papers. There were three candidates, Frame, Monteith, and Moscrip, and their names were arranged in alphabetical order, Monteith's being in the centre division. Frame chose black as his colour, Monteith, blue, and Moscrip, red; and it is said, and I suppose truly, that the ballot had to pass through the printing press at least three times. And in all these fourteen cases, Monteith's surname, that is, the one printed in large type, was placed either upon or above the line separating his division from Frame's, instead of being placed wholly within the division intended for it. The Christian name and surname, however, in smaller type,

and the addition of each candidate, are wholly within his own division. In two of such cases, in which the cross was placed at the right hand of the large surname, but a little higher up than exactly opposite to it, the learned Judge allowed the votes for Frame; but in the above fourteen cases, where the cross was very nearly opposite to the large name "Monteith," he allowed it, although in one case it was exactly on the dividing line, and in all the other cases wholly above it. His reason for doing so is that the voter, having placed his mark opposite to the candidate's name on the right hand side, has complied literally with the Act; and that would be so but for the other direction that it may be placed anywhere within the division containing the candidate's name. The difficulty is that one of Monteith's names is in, or partly in, Frame's division, and that persons intending to vote for the latter are told they may do so by placing their cross anywhere within the division containing the name. When the Legislature speaks of divisions containing the names, and when the form of ballot prescribed and used has lines upon it indicating such divisions, I think it cannot be said that the lines are immaterial or that they may be disregarded. I think a voter intending to vote for Frame, and being told that he would be right if he put his mark anywhere in the division containing his name, might have marked his ballot exactly as any one of these fourteen which have been allowed for Monteith. There is one exception from that remark, namely, No. 5230, in which the cross is exactly upon the line, and may have been intended for either one or the other. The learned Judge says the dividing line between Frame's division and Monteith's division must be conceived to be drawn immediately above the surname of the latter; but I think I cannot disregard the fact that there is an actual dividing line upon the ballot, separating the two divisions, and that every one of the votes in question may in fact have been intended for Frame, being within the division of the ballot containing his name, notwithstanding that they are also at the right hand side, and opposite or nearly opposite to Monteith's name, and may have been intended for him. I think those fourteen ballots ought not to have been allowed, and ought to be taken off Mr. Monteith's poll.

The learned Judge has not in his certificate stated what he found the majority to be, or in whose favour it was, and I can do no more than to decide that the fourteen ballots above mentioned ought to have been rejected.

I think there should be no costs.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 21ST APRIL, 1898.

HENDRIE v. ONDERDONK.

Railways—Construction—Damages caused by—Negligence—Action for, against sub-contractor—Limitation of actions—Provisions of Dominion and Ontario Railway Acts—Defence of sub-contractor.

The defendant was a sub-contractor for the construction of a tunnel on the line of a railway company authorized by statute to construct a railway through a city.

In the course of the work the contractor cut the drains and water pipes connected with an adjoining house, of which the plaintiff was tenant, and prevented access to the house for a time; the plaintiff's goods were also damaged by blasting and by dust and smoke occasioned by the work of construction.

In an action for damages:—

Held, that, as no negligence in doing the work was shown, the plaintiff could not succeed.

Held, also, that, even if a remedy by action was open to the plaintiff, as the railway company, when it was brought within the jurisdiction of the Dominion Parliament by 54 & 55 V. c. 86, preserved its right to set up the limitation clause in the Ontario Act, R. S. O. 1887 c. 170, s. 142, this statute could be pleaded in bar to the action as well as the limitation clause in the Dominion Railway Act, 51 V. c. 29, s. 287, and this defence was available to the contractor, and the action, not having been commenced within six months from the time the damage was sustained, was brought too late.

Judgment of the County Court of Wentworth affirmed.

Wallace Nesbitt, for the plaintiff.

D. W. Saunders, for the defendant.

[BOYD, C., FERGUSON, J., 25TH APRIL, 1898.

CLARK v. KEEFER.

Will—Trustees to sell for best price—Power of sale coupled with trust—Discretion of trustees—Right of Court to enforce trust.

Where a power is coupled with a trust or duty, the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bona fide* exercise of it.

Where, therefore, lands were devised to trustees upon trust, in their discretion, to sell lands, as soon as they might deem it proper to do so, for the most money that could reasonably be obtained therefor; the trustees, by a later clause, not to be answerable for the exercise or non-exercise of the powers therein contained, or for the manner of the exercise thereof:—

Held, that the power of sale was coupled with a trust to sell for the most money, etc., and that the Court would enforce such trust by requiring the most money to be obtained, the powers of the Court being in no way affected by the later clause exonerating the trustees, which extended merely to the time and manner of exercising the trust.

G. G. S. Lindsey, for the plaintiff.

Osler, Q.C., and *Delamere*, Q.C., for the defendants.

FRASER v. LONDON STREET RAILWAY COMPANY.

Street railways—Foot board on side of car—Invitation to stand on—Improper construction of bridge—Negligence—Excessive damages—New trial.

On an electric car on the defendants' railway, there was a step or foot board running along the side of the car about a foot from the ground, leading to doors in the centre and rear parts of the car, with a brass rail or rod about chest high, for persons standing thereon to hold on by, and electric buttons to communicate with the conductor. The plaintiff, seeing that the car was filling up rapidly, all the inside seats being occupied, and the rear platform crowded, jumped on

the separate use of the property, to which she was entitled under the Married Women's Act in force at the date of the marriage, 1894, ceased, by her death in 1896.

W. H. Irving, for the plaintiffs.

C. A. Ghent, for the defendant.

[ARMOUR, C.J., 2ND JUNE, 1898.

MANNING v. ROBINSON.

Will—Construction—Gift to charities—Validity—Legacies—Deduction of legacy duty—"Protestant charitable institutions."

On motion for judgment on the pleadings in an action for construction of the will of James Robinson, deceased:—

Held, that the gift of the residue to the executors to be distributed "among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they . . . may deem proper," was a valid gift, having regard especially to s. 8 of 55 V. c. 20, R. S. O. c. 112, the provision in force at the time of the testator's death in 1895.

Held, also, that the legacy duty payable to the Government was to be deducted from the legacies and should not be paid out of the residue, and the plaintiffs had no discretion to pay such duty out of the residue: *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Held, also, that the House of Refuge for the Poor of the County of Peel was not within the terms of the residuary gift. The word "Protestant," as used in the will, was referable as well to the objects of the charitable institutions as to their government; and "Protestant charitable institutions" are such charitable institutions as are managed and controlled exclusively by Protestants, and are designed for the bestowal of charity upon Protestants alone.

Justin, for the plaintiffs.

Hollis, for the defendant Robinson.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[ROSE, J., 25TH APRIL, 1898.

MALCOLM v. PERTH MUTUAL FIRE INSURANCE COMPANY.

Malicious prosecution—Finding of jury—Reasonable and probable cause—Bona fides—Malice.

In an action for malicious prosecution brought against an insurance company by reason of its laying an information charging the plaintiff with arson, and causing his arrest thereon, the jury found that the company's officers, who laid the charge, believed it to be true; but that such belief was not under the circumstances reasonable, and that they did not act on it in laying the charge and causing the arrest, but that they were actuated by other and improper motives.

Held, that the first finding, being a finding that the defendants acted on their honest belief, and the evidence warranting that finding, absence of reasonable and probable cause could not be held to have been shown simply because further inquiries might have been made and further facts shown; that the question of malice was of no importance; and the defendants were entitled to judgment.

Brewster and *G. D. Heyd,* for the plaintiff.

J. P. Mabee, for the defendants.

[26TH MAY, 1898.

SCOTTISH ONTARIO AND MANITOBA LAND CO. v. CITY OF TORONTO.

DEFOE v. CITY OF TORONTO.

Municipal corporations—Waterworks—Supply of water—Statutory obligation—Breach of contract.

In actions by consumers of water against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevators according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevators:—

Held, that there was no right of action in the plaintiffs by reason of any statutory obligation on the part of the defendants.

2. That, on the evidence, there was no contract between the plaintiffs and the defendants by which the latter were bound to supply the former with water free from sand.

The relation was rather that of licensor and licensee than one founded upon contract.

Ritchie, Q.C., and *H. M. Mowat*, for the plaintiff company.

Walter Read, for the plaintiff Defoe.

Robinson, Q.C., and *Fullerton*, Q.C., for the defendants.

[STREET, J., 14TH MAY, 1898.

BAKER v. TRUSTS AND GUARANTEE CO.

Bond—Condition—Penalty—Maintenance—Lien on land—Enforcement—Registration.

The plaintiff sold her share in her father's real estate to her brother, and accepted in payment a bond from him in the penal sum of $400 conditioned for her maintenance and support, and giving her a lien on the land, which bond was registered.

In an action brought after her brother's death against subsequent mortgagees of the land to establish and enforce a lien for her maintenance:—

Held, that she was not limited to the amount of the penalty in the bond, but had the right to sue for her support as it accrued from time to time, and that the registration of the bond gave her a lien on the land as against the defendants.

R. Smith and *George H. Pettit*, for the plaintiff.

Leitch, Q.C., for the defendants.

[26TH MAY, 1898.

BROCK v. BENNESS.

Limitation of actions—Infant heir-at-law—Entry—Evidence of lease—Estoppel—Adverse title—Overholding lessees—Tenants in common.

In an action of ejectment, it appeared that the father of the defendant died intestate in 1849, the owner of the fee in and in possession of the lands in question. He had been twice married, but none of the children of his first marriage had been heard of since 1853. His widow continued in possession after his death with her children; she married again in 1852, and her husband lived with her upon the land until her death intestate in 1871. At this time her husband and the youngest daughter of her first marriage, the defendant, were the only members of the family upon the land. Soon after her death, her eldest son made a lease of the land to his stepfather and his sister, the defendant, for five years from the 1st November, 1871, at the yearly rent of one dollar. In this lease, which was executed by the lessees, the lessor was described as the eldest son and heir at law of his father, the original owner. This lease was never renewed, and no evidence was given of the payment of any rent under it, but the lessees remained together in possession of the property, without acknowledgment or interruption, until 1892, when the stepfather died intestate, leaving a son, one of the plaintiffs, surviving him, and since that time the defendant had been in possession, also without acknowledgment or interruption, until this action was brought in 1897, by the surviving brother and sister of the defendant and her half-brother. The lessor had died in 1878; it was said that he left one son, who, when very young, in 1880, was taken by his aunt, one of the plaintiffs, to the house upon the land, where he stayed one night; and the aunt said that she told her sister, the defendant, that he was the heir to the property.

Held, that, even if the boy were the true owner, this was not an entry upon the land, as owner, sufficient to stop the running of the statute.

2. The defendant and her stepfather, being in possession without any title, and accepting a lease from the eldest son of the second marriage, as the heir-at-law, were estopped from

setting up the adverse title of the real heir-at-law, the eldest son of the first marriage, as against the lessor or persons claiming under him.

3. The plaintiffs' claim to possession under conveyance from the alleged heir-at-law of the lessor could not be allowed, because there was no evidence that he was the heir-at-law, and because his title, if he had any, had been barred by the possession of the defendant and her stepfather since 1876, when the lease expired.

4. The title acquired by the defendant and her stepfather by length of possession was acquired by them as tenants in common, and not as joint tenants, and therefore, upon the death of the latter, his undivided half descended to his son.

Ward v. *Ward*, L. R. 6 Ch. 789, distinguished.

T. H. Luscombe, for the plaintiffs.

Talbot Macbeth, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

[The Judges in Banc, 23rd March, 1898.

McISAAC v. BROAD COVE COAL COMPANY AND HUSSEY.

Pleading—Statement of claim—Late delivery—Irregularity—Motion.

The defendants appeared in the action, and demanded delivery of a statement of claim. After the time for such delivery had expired, the plaintiff delivered a statement of claim. The defendants moved at Chambers to strike it out, on the ground that it was delivered too late, and Judge at Chambers ordered it to be struck out.

Held, on appeal, that the defendant not having moved to dismiss the action for want of prosecution before the state-

ment of claim was delivered, it was regular and ought not to have been struck out.

A. McDonald and *F. F. Mathers*, for the plaintiffs.

D. McNeil, for the defendants.

McISAAC v. BROAD COVE COAL COMPANY AND McKAY.

Action—Want of prosecution—Motion to dismiss—Notice of—Notice of intention to proceed.

The defendants served a month's notice of motion for an order to dismiss the action for want of prosecution. For more than a year prior to the service of the notice of motion, there had been no proceeding in the action. The motion to dismiss was opposed at Chambers on the ground that, no proceeding having been taken in the action for more than one year, Order 60, Rule 9, had not been complied with. The Judge referred the matter to the Court *in banc.*

Held, that a month's notice of motion was not a compliance with the Rule, and did not dispense with the necessity for a month's notice of "intention to proceed," and that the Rule applied to a motion to dismiss an action for want of prosecution. The application to dismiss the action was refused with costs.

D. McNeil, for the defendants.

A. McDonald and *F. F. Mathers*, for the plaintiff.

[HENRY, J., 2ND MARCH, 1898.

HART v. CUNNINGHAM.

Absconding debtor—Attachment—"Goods, credits, effects, and choses in action"—Interest in estate under will—Equitable interest in mortgage—Liability to attachment—Equitable execution—Receiver—Priorities—Collateral attack by receiver on attachment proceedings.

Thomas A. Anderson died in 1875, leaving a will appointing his wife, Caroline Anderson, executrix thereof "as long as she should remain his widow," and bequeathing the income of the estate to her "for her natural life or until she

remarried." On her death or remarriage, the estate was to be divided into two equal parts between the testator's two children. One of his children, Annie, married the defendant Cunningham in 1883, and died in 1893, leaving a will appointing her husband executor, and dividing her expectancy in her father's estate into two equal parts, bequeathing one-half to her husband and the other half to her children.

On the 8th November, 1894, the Caribou Gold Mining Company executed in favour of Brookfield Brothers a mortgage to secure the repayment of $40,000 advanced to the company, of which amount Cunningham personally advanced $8,000.

On the 17th December, 1896, Cunningham, being in financial difficulties, suddenly left the Province of Nova Scotia, and several persons issued process against him as an absent and absconding debtor under the provisions of the Nova Scotia Judicature Act, 1894, Order XLVI., and summoned Caroline Anderson and Brookfield Brothers as agents, alleging that they had "goods, credits, effects, and choses in action," belonging to Cunningham in their hands. The plaintiff subsequently recovered judgment against Cunningham, and obtained the appointment of a receiver by way of equitable execution to receive his interest in the Anderson estate and in the Brookfield mortgage.

This action was instituted for a declaration that the plaintiff had a lien on the Anderson estate and on Cunningham's interest in the mortgage, prior to the attaching creditors.

Held, that Cunningham was not an absent or absconding debtor when he was proceeded against as such.

2. That the attachment proceedings were unjustifiable in law and could be collaterally attacked by the plaintiff as being without jurisdiction: Am. & Eng. Encyc. of Law, vol. 1, p. 894; Drake on Attachment, ss. 83, 84, 85; *Downes* v. *Fuller*, 2 Met. 135; *Leonard* v. *Bryant*, 11 Met. 370.

3. That the interests of Cunningham in the Anderson estate and the Brookfield mortgage were not subject of attachment; neither of them coming under any of the terms "goods," "credits," or "choses in action," as Cunningham

had no right of action in respect of them when the attachments issued: *Webster* v. *Webster*, 31 Beav. 393, 397; *Field* v. *Crawford*, 6 Gray 116.

4. That the plaintiff was entitled to priority over the attaching creditors in respect of the interests in question.

R. L. Borden, Q.C., and *E. P. Allison*, for the plaintiff.

Hector McInnes, for the attaching defendants.

W. F. McCoy, Q.C., for the Anderson estate.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 11TH MAY, 1898.

REGINA v. CLOUTIER.

Criminal law—Arrest of prisoner in Manitoba without warrant on telegram received from another Province—Representation as to issue of warrant—Criminal Code, s. 552—58 & 59 V. c. 40—Habeas corpus—Validity of arrest—Bail.

Application for discharge of a prisoner under a writ of *habeas corpus*.

The prisoner was arrested by the Chief Constable of Winnipeg on the following telegram:

"Montreal, 10th May, 1898.

J. C. McRae, Chief of Police, Winnipeg.

Please arrest Ferdinand Cloutier. Warrant against him for false pretences. Officer will be sent for him on receipt of telegram from you, if arrested.

A. Bissonette, Chief Constable."

The return of the Chief Constable to the writ stated that he was a police officer in the city of Winnipeg and a peace officer; that Ferdinand Cloutier named in the writ, on or about the 20th February, 1898, at the city of Montreal, with

intent to defraud by false pretences, directly obtained from Doull and Gibson, goods capable of being stolen, of the value of $1,387, knowledge whereof coming to his notice, he did, as such peace officer, at and in the city of Winnipeg, arrest and detain F. Cloutier without a warrant, pursuant to the statute in that behalf made and provided; that on the 10th May, 1898, he received the telegram above set forth, and on the same day he received an additional telegram from Bissonette: "Hold Ferdinand Cloutier. Detective Killert leaves with warrant. He will be with you Friday." That on the 10th May, on reasonable and probable grounds, he believed that an offence for which the offender could be arrested without a warrant had been committed by F. Cloutier, wherefore he did on the 10th May, 1898, as such peace officer, arrest and then detain the said F. Cloutier without a warrant, pursuant to the statute in that behalf.

Held, that, as the return showed that the prisoner had in fact committed one of the offences specified in s. 552, s.-s. 2, of the Criminal Code, as amended by 58 & 59 V. c. 40, the officer had authority to arrest him without a warrant. The offence was committed in the Province of Quebec, but the criminal law was enacted for the whole of Canada, though it had, in general, to be enforced by provincial Courts and provincial officers. A police officer appointed under provincial authority could arrest in this way for an offence committed in another Province of Canada.

Section 22 of the Code operates not merely to protect a peace officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful.

It was contended on behalf of the officer that no justice of the peace in Manitoba had jurisdiction to deal with the accused; and counsel for the prisoner, while not admitting this, confessed to being unable to show authority to the contrary.

The Court assumed that this contention was correct, and did not then determine whether the officer should take his prisoner to Montreal or hold him for the arrival of the warrant said to have been issued in Montreal. But, as the prisoner's counsel was not able to show any authority for the

release of the accused on bail, the Court retained the application, and enlarged it for two days; the accused to be allowed to go on bail to appear then before the Court unless previously arrested upon a lawful warrant.

The prisoner was subsequently arrested by a detective from Montreal and taken there for trial.

Tupper, Q.C., and *Phippen*, for the prosecution.

Howell, Q.C., for the prisoner.

[TAYLOR, C.J., 27TH MAY, 1898.

CHAZ v. LES CISTERCIENS REFORMES.

Fire—Damage by—Custom of agriculture—Reasonable precautions—Absence of negligence.

The plaintiff sued to recover damages for the loss of his crop, by reason, as he alleged, of the defendants setting out fire on their farm, and allowing it to escape therefrom and run over the neighbouring country.

On Thursday the 30th September, 1898, fire was set out on the farm by some members of the defendant community, and on the next day fire broke out there twice. On the Saturday morning fire broke out again, at or near the north boundary of their farm, spreading a short distance beyond their fence line, towards or up to a road or trail running on the adjoining lot, along and at varying distances from the north boundary of their farm. Towards afternoon of that day a high south wind sprang up, and a fire again broke out, at or close to the place where there had been fire in the morning, which swept down in a northerly direction to the plaintiff's land, a considerable distance away, by which his crop was destroyed.

No satisfactory account of the fire on Saturday afternoon, as independent of the previous fire, was suggested. On the evidence it must be found as a fact that the fire on Saturday afternoon which destroyed the plaintiff's crop was connected with and must be traced back to the fire set out on the defendants' farm on the Thursday.

The fire of Thursday was set out by members of the defendant community to burn a ring or fire guard round some of their hay stacks, and the question arose whether the present case came within *Dean* v. *McCarty*, 2 U. C. R. 448, and the other Ontario cases which followed it.

Held, that in the Province of Manitoba the use of fire to burn a guard round hay stacks should be regarded as the use of it in a customary way for the purpose of agriculture. The use of fire for that purpose has the sanction of the Legislature: Fires Prevention Act, R. S. M. c. 60. The defendants could not be charged with improperly setting out the fire in the first instance, and they took reasonable precautions to prevent it spreading. They believed and had reason to believe that it was completely put out, although it must, in some places, have been smouldering in the ground. It was an exceptionally high wind, springing up suddenly on the Saturday, and fanning some smouldering embers on the ground into flame, which caused the disaster.

A verdict should be entered for the defendants with costs.

Howell, Q.C., and *Haney*, for the plaintiff.

Aikins, Q.C., and *Dubuc*, for the defendants.

Supreme Court of Canada.

EXCHEQUER COURT.] [8TH MARCH, 1898.

GOODWIN v. THE QUEEN.

Crown—Contract—Construction of—Public works—Progress estimates—Engineer's certificate—Approval by head of department—Final estimates—Condition precedent.

Clause 8 of the appellant's contract for the construction of certain public works was, as drafted, as follows: "That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications, and drawings, shall be final, and no works, or extra or additional works or changes, shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;" but before the contract was signed by the parties the words "as to the meaning or intention of this contract, and the plans, specifications, and drawings," were struck out.

Clause 25 was as follows: "Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for or on account of which the certificate is

granted has been duly executed to his satisfaction, and stating the value of such work, computed as above mentioned, and upon approval of such certificate by the Minister for the time being; and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof."

A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water-tight" embankment under the provisions of the contract and specifications relating to the works, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute, in the usual form, but added after his signature the following words: "Certified as regards item 5 (the item in dispute) in accordance with letter of Deputy Minister of Justice dated 15th January, 1896."

The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor.

Held, that, under the circumstances of the case, the certificate sufficiently complied with the requirements of clause 25 of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under clause 8, adjudicating upon a dispute under that clause, and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim; and that the certificate given in this case, whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of clause 25 of the contract.

Murray v. *The Queen*, 26 S. C. R. 203, discussed and distinguished.

Judgment of the Exchequer Court of Canada, 5 Ex. C. R. 293, reversed.

Osler, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Ritchie, Q.C., and *Chrysler*, Q.C., for the respondent.

QUEBEC.] [6TH MAY, 1898.

BURLAND v. LEE.

Master and servant—Negligence—Contributory negligence—Evidence.

In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle need be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman.

Held, reversing the judgment of the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable.

G. Stuart, Q.C., and *F. Maclennan*, for the appellant.

Saint-Pierre, Q.C., for the respondent.

DOMINION CARTRIDGE CO. v. CAIRNS.

Master and servant—Negligence—Fault of fellow-servant—Evidence—Employer's liability—Arts. 1053, 1056, C.C.

The defendants carried on the manufacture of detonating cartridges or caps to be used for the purpose of exploding large bodies of dynamite, made by charging

copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, calling for great care in manipulation. It is, when dry, liable to explode by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of the defendants' foreman to bring a sufficient quantity of the mixture twice a day, for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with an atomizer. It was also the foreman's duty to fill the empty shells with the fulminating mixture, as they were handed to him set on end in wooden plates, and then pass them on, through a slot in his compartment, to a shelf, whence they were removed by another employee, and the charges pressed down to the bottom of the shell by means of a pressing machine, worked by C., at a table near by. An explosion took place, which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in sprinkling, or from an accummulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C., the person operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine.

The theory propounded by the plaintiff, the father of C., admitting that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, assumed that the fulminate had not been sufficiently dampened, and that the existence of this condition indicated carelessness on the part of the foreman, and gave rise to the presumption that the explosion originated in

his department. Against this was the evidence of the surviving employee, which would lead to the conclusion that the explosion originated at the pressing machine.

There was evidence to show that the defendants had taken all reasonable precautions to diminish the risk of injury to their employees in the event of an explosion, and that conformity with the rules they had prescribed and instructions given by them to their employees for the purpose of securing their safety, would be sufficient to secure them from risk or injury.

Held, that, as it appeared, under the circumstances of the case, that the cause of the accident was either unknown, or else that it could fairly be presumed to have been caused by the negligence of the person injured, and whose personal representative had brought the present action, that no fault could be imputed to the defendants which would render them liable in damages.

Judgment of the Court below reversed.

Macmaster, Q.C., and *Fleet*, for the appellants.

Trenholme, Q.C., and *Hutchins*, for the respondent.

CANADA PAINT CO. v. TRAINOR.

Master and servant—Negligence—Evidence—Probable cause of accident.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident, is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture.

Judgment of the Court below reversed.

Stuart, Q.C., and *F. Maclennan*, for the appellant.

Robidoux, Q.C., for the respondent.

NOVA SCOTIA.]

CUMMINGS v. TAYLOR.

Bankruptcy and insolvency—Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth—Account against assignee.

Where an assignment has been held void as against the statute 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor, and, notwithstanding the assignment, sold all the debtor's personal property so transferred, under execution issued upon the judgment, is entitled to all the personal property of the assignor so levied upon by him under his execution, such creditor has no legal right or equity to an account or to follow moneys received by the assignee or paid by him, under such assignment, in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

Judgment of the Court below reversed.

Lovett, for the appellants.

McNeil, for the respondents.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

IN CHAMBERS.

[FERGUSON, J., 21ST JUNE, 1898.

In re LEWIS ESTATE.

Distribution of estates—Relinquishment by son of share in father's estate—Pre-decease of son—Right of his children to share on intestacy—Advancement—Hotchpot.

An application by the Toronto General Trusts Com-

pany, the administrators of the estate of George Lewis, who died in 1897, by way of originating notice, under Rule 938, for the advice or direction of the Court as to whether or not the children of George Edward Lewis, who was a son of the intestate, and who died in 1890, were entitled to share in the estate of their grandfather, consisting of lands and personalty, and, in the event of its being determined that they were entitled to so share, as to whether or not they should bring into "hotchpot" certain lands conveyed by the intestate to his son George Edward, on the 10th December, 1880, pursuant to an agreement in writing then made between them. This agreement recited that differences had arisen between the parties to it, and that the son had agreed with the father that, in consideration of the father conveying his interest in certain lands, the son should relinquish all claims he then had against the father, or which he might thereafter have as co-heir at law of or next of kin to the father, and that the son would not attempt to enforce any such claim or claims; and the son covenanted that he accepted the lands conveyed as an advancement to him in lieu of and in full satisfaction of all claims which he then had, or which he, or his heirs, executors, administrators, or assigns, might thereafter have or claim to have against the father, his executors, administrators, or assigns, or the estate of the father, either for money or wages then due, or as one of the co-heirs of or next of kin to the father.

Held, that the children of George Edward Lewis would take, if at all, *per stirpes*, that is to say, not in their own right, but as representing their father, and, it being properly conceded that he, if living, would be precluded from taking anything, the grandchildren were not entitled to share in the estate at all.

Held, also, that the conveyance of the land by the father to the son was an advancement, and the children of the latter could not have a distributive share of the former's estate unless they brought in his advancement.

A. E. Hoskin, for the administrators.

William Macdonald, for the adult grandchildren.

A. J. Boyd, for the infant grandchildren.

A. Hoskin, Q.C., for the daughters of the intestate.

[MEREDITH, J., 17TH JUNE, 1898.

FITCHETT v. MELLOW.

Costs—Scale of—Jurisdiction of County Court—Trespass to land—Injunction—Counterclaim—Declaratory judgment.

An injunction is a remedy, not a cause of action; and *semble*, that before 59 V. c. 19 the County Courts had power under R. S. O. 1887 c. 47, s. 21, to grant injunctions in actions, within their jurisdiction, in which an injunction would have been the proper remedy.

Now, under s. 23, s.-s. 8, of R. S. O. c. 55, a County Court can give a judgment for nominal damages, and an injunction in an action for trespass to land where the value of the land does not exceed $200.

An injunction is equitable relief, and *semble*, that the provisions of s.-s. 13 of the same section would also enable the Court to give such a judgment.

A counterclaim upon which no relief is given can make no difference as to the jurisdiction of a Court; and *semble*, also, that a judgment declaring a right can be given in a County Court by virtue of s.-s. 13.

Where an action of the proper competency of a County Court was brought in the High Court, the successful plaintiff was allowed costs on the County Court scale, with a set-off to the defendants of the excess of their costs over County Court costs.

Clute, Q.C., for the plaintiff.

H. E. Rose, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[ROULEAU, J., 1ST APRIL, 1898.

LOWTHER v. JOHNSON.

Distress—Rent—Tenant in common with lessor—Right to distrain—Use and occupation—Nominal damages—Costs.

On the 2nd January, 1896, the defendant and one Fulmer became tenants in common of a lot of land. On the 1st May, 1896, Fulmer leased the premises to the plaintiff, Mary Frances Lowther, without the knowledge or consent of the defendant, and collected and retained the whole of the rents. In November of the same year the defendant notified the plaintiff that he owned a half interest in the premises, and demanded payment to him for the future of half the rents, and at the same time notified Fulmer of his demand. The plaintiff, however, continued to pay the whole rent to Fulmer. On the 22nd July, 1897, the defendant caused a distress to be made on the plaintiff's goods, whereupon the plaintiff brought this action for illegal distress, claiming $50 damages. On receipt of an undertaking from the plaintiff to make good the amount of the distress, if it should be held lawful, the defendant released the plaintiff's goods.

The action was tried before ROULEAU, J., without a jury, in February, 1898.

P. McCarthy, Q.C., for the plaintiff.

McCaul, Q.C., and *James Short*, for the defendant.

ROULEAU, J.—At the trial the plaintiff proved, under objection, that he was owner of one-half of the premises leased. Taking for granted that he could adduce such evidence, there is no doubt that in law he would be tenant in common with Fulmer. If they were joint tenants, there would be no difficulty in deciding whether either of them could distrain, because it is clearly laid down in *Robinson* v. *Hoffman*, 4 Bing. 560, that one joint tenant

may recover the whole rent and give a discharge for it; he may therefore distrain, and he must avow according to the title. But can a tenant in common distrain for his own share of the rent, where his co-tenant has leased the premises in his own name and received the rent therefor, although it be shown that he gave due notice of his title to the lessee?

[*Harrison* v. *Burnby*, 5 T. R. 246, considered and distinguished.]

This case is quite different. There was no relation of lessor and lessee between the defendant and the plaintiff. Under the rule of law the lessee, quoad the defendant, could be considered only as an occupant of his undivided half of the premises, and liable for an action for use and occupation after due notice given. The notice given by the defendant had not the effect of creating a lease between him and the plaintiff. This remedy by distress is given to a landlord for the summary enforcement of payment of rent by the lessee, and to none other.

I am therefore of the opinion that the defendant had no right to distrain for the rent in this case, and that the plaintiff is entitled to nominal damages for unlawful distress, no real damage having been proven.

Judgment for the plaintiff for $5 damages and costs.

[Scott, J., May, 1898.

In re CITY OF CALGARY AND STEEN.

Statutes—Repeal—Special Ordinance—General Ordinance.

Upon an application by the city corporation to confirm the sale for taxes of certain lots of land within the city limits:—

Held, that Ordinance No. 33 of 1893, incorporating the city of Calgary, has not been repealed by the Municipal Ordinance of 1894, but is still in force.

Maxwell on Statutes, pp. 42, 212-3; *Seward* v. *Vera Cruz*, 10 App. Cas. 68; and *Fitzgerald* v. *Champneys*, 30 L. J. Ch. at p. 782, referred to.

Smith, Q.C., for the city corporation.

P. McCarthy, Q.C., for the registered owner.

Supreme Court of Canada.

ONTARIO.] [6TH MAY, 1898.

BUILDING AND LOAN ASSOCIATION v. McKENZIE.

Mortgage—Leasehold—Acquisition of reversion by mortgagor—Liability for payment of mortgage—Lien—Priorities.

The assignee of a term, who takes the assignment subject to a mortgage, and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee.

Emmett v. *Quinn*, 7 A. R. 306, distinguished.

Judgment of the Court of Appeal, 24 A. R. 599, 17 Occ. N. 394, affirmed.

E. D. Armour, Q.C., and *D. W. Saunders*, for the appellant.

H. J. Scott, Q.C., and *Allan Cassels*, for the respondents.

[14TH MAY, 1898.

MILLER v. HAMILTON POLICE BENEFIT FUND.

Benefit society—Rules—Construction—Suspension of payment.

In 1889 the police force of Hamilton established a benefit fund to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided that no money should be drawn from the fund for any purpose whatever until it should reach the sum of $8,000.

Held, that, in case of a member of the force dying before the fund reached that sum, the gratuity to his family was merely suspended, and was payable as soon as the amount was realized.

Judgment of the Court of Appeal reversed.

Watson, Q.C., for the appellants.

Teetzel, Q.C., for the respondents.

BAIN v. ANDERSON.

Master and servant—Action for wrongful dismissal—Indefinite hiring—Temporary arrangement—Evidence—Notice—Supreme Court of Canada—Jurisdiction—Amount in controversy—Dismissal on the merits where jurisdiction doubtful.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year, is a question of fact, to be decided upon the circumstances of the case.

A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that, if he desired to remain, his salary would be considerably reduced. Having refused to accept the reduced salary, he was dismissed, and brought an action for damages, asserting that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment of the Court of Appeal, 24 A. R. 296, 17 Occ. N. 210, which reversed that of MEREDITH, C.J., at the trial, 27 O. R. 369, 16 Occ. N. 143, that, as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reduction of expenses and salaries; as he had been informed that the contracts with the employees had not been assumed by the purchaser; and as, upon his own evidence, there was no hiring for any definite period, but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made; the foreman had no claim for damages, and his action was rightly dismissed.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal is doubtful, the Court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed.

Braid v. *Great Western R. W. Co.*, 1 Moo. P. C. N. S. 101, followed.

By 60 & 61 V. c. 34, s. 1, s.-s. (*c*), no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy *in the appeal* exceeds $1,000, and by s.-s. (*f*), it is the amount demanded and not that recovered which determines the amount in controversy.

Held, per TASCHEREAU, J., that, to reconcile these two sub-sections, (*f*) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the Court has put upon R. S. C. c. 135, s. 29 (2), relating to appeals from Quebec, would seem to be contrary to the intention of Parliament.

Laberge v. *Equitable Ins. Co.*, 24 S. C. R. 59, distinguished.

Gibbons, Q.C., for the appellant.

S. H. Blake, Q.C., and *Osler*, Q.C., for the respondents.

OSTROM v. SILLS.

Water and watercourses—Surface water—Easement—Adjoining proprietors of land—Different levels.

O. and S. were adjoining proprietors of land in a village, that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887 S. erected a building on his land, and cut off the wall of the culvert, which projected over the line of the street, which resulted in the flow of water through it being stopped and backing up on the land of O., who brought an action against S. for the damage caused thereby.

Held, that S., having a right to cut off the part of the culvert which projected over his land, was not liable to O.

for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain.

Judgment of the Court of Appeal, 24 A. R. 526, 17 Occ. N. 356, affirmed.

C. J. Holman and *E. G. Porter*, for the appellant.

Clute, Q.C., and *J. Williams*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ROSE, J.] [30TH JUNE, 1898.

SPARKS v. WOLFF.

Will—Construction—Change in law—"Heirs"—14 & 15 V. c. 6—43 V. c. 14, s. 2.

A testator, who died on the 8th November, 1867, by his will, made on the 15th October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, "should he be living at the happening of either of said contingencies," and if not then living, "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887.

Held, that the Act abolishing heirship by primogeniture, 14 & 15 V. c. 6, applied, and that all the brothers and sisters of the son were his "heirs" and entitled to take under this devise.

Tylee v. *Deal*, 19 Gr. 101, and *Baldwin* v. *Kingstone*, 18 A. R. 63, distinguished.

Judgment of ROSE, J., reversed.

E. D. Armour, Q.C., for the appellant.

Osler, Q.C., for the respondent.

FALCONBRIDGE, J.]

LANGLEY v. MEIR.

Bankruptcy and insolvency—Assignments and preferences—Landlord and tenant—Rent—Acceleration clause—58 V. c. 26, s. 3, s.-s. 1.

Sub-section 1 of s. 3 of 58 V. c. 26, now R. S. O. c. 170, s. 34, s.-s. 1, is a restrictive provision, and limits the landlord's lien even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision.

Clark v. *Reid*, 27 O. R. 618, 16 Occ. N. 263, overruled.

Judgment of FALCONBRIDGE, J., reversed.

Shepley, Q. C., for the appellant.

W. Barwick, for the respondent.

ASSESSMENT COURT.]

In re CANADA LIFE ASSURANCE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Life insurance company—Reserve fund—Income—Divisible profits.

The net interest and dividends received by the Canada Life Assurance Company from investments of their reserve fund form part of their taxable income, though to the extent of ninety per cent. thereof divisible—pursuant to the terms of the company's special Act—as profits among participating policy holders, and not subject to the control or disposition of the company.

Judgment of an Assessment Court affirmed.

Bruce, Q.C., for the appellants.

Robinson, Q.C., and *MacKelcan*, Q.C., for the respondents.

In re BELL TELEPHONE COMPANY AND CITY OF HAMILTON.

Assessment and taxes—Telephone company—Poles, wires, conduits, and cables.

In assessing for purposes of taxation the poles, wires, conduits, and cables of a telephone company, the cost of con-

struction or the value as part of a going concern is not the test; they must be valued, in the assessment division in which they happen to be, just as so much dead material to be taken in payment of a just debt from a solvent debtor.

Judgment of the Assessment Court reversed.

Lynch-Staunton and *Ambrose*, for the appellants.

MacKelcan, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 27TH JUNE, 1898.

KENNEDY v. BEAL.

Arbitration and award—Arbitrator selected by the parties—Rule 652.

Upon a proper construction of ss. 12 and 35 of the Arbitration Act, c. 62, Rule 652 does not apply to the case of an arbitration ordered by the Court on consent, where the arbitrator is selected and agreed on by the parties.

Robinson, Q.C., and *Ryckman*, for the plaintiff.

Aylesworth, Q.C., and *Snow*, for the defendants.

[MEREDITH, C.J., ROSE, J., MACMAHON, J.

ALLEN v. ONTARIO AND RAINY RIVER R. W. CO.

Company—Contract made by director—Authorisation—Informality—Sale of undertaking—Purchase money—Equitable charge upon.

The plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking. The evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking, and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did, and of his manner of doing it, and

vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company.

Held, that the plaintiff was entitled to recover from the company the value of his work.

Mahony v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, followed.

Wood v. *Ontario and Quebec R. W. Co.*, 24 C. P. 334, commented on.

The undertaking having been sold by the provisional directors, free of all liens and incumbrances, for a certain sum of money, which was paid to them, and a portion of which was paid into Court under an order in another action; all the provisional directors being parties to this action, and two of them submitting to the order of the Court and being willing that the judgment debt should be paid out of the fund in Court; an order was made, notwithstanding that the purchasers were not parties, directing payment of the plaintiff's debt and costs and of the costs of the two directors out of such fund.

W. R. Riddell, for the plaintiff.

D. W. Saunders, for the defendant company.

S. H. Blake, Q.C., and *H. M. Mowat*, for the defendant Gorham.

D. L. McCarthy, for the defendants Burk and Dwyer.

[29TH JUNE, 1898.

REGINA v. LYON.

Criminal law—Demanding property with menaces—Criminal Code, 1892, s. 404—Intent to steal—Evidence.

"Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it:" s. 404, Criminal Code, 1892.

The defendant was convicted by a magistrate of an offence against this enactment.

The evidence was that the defendant went, as agent for others, to the complainant's abode to collect a debt from him; that the defendant threatened the complainant that if the latter did not pay the debt, he would have him arrested; that the defendant demanded certain goods, part of which had been sold to the complainant by the defendant's principals, and on account of which the debt accrued, but upon which they had no lien or charge; and the complainant, as he swore, being frightened by the threats and conduct of the defendant, acquiesced in the demand for the goods, which the defendant took away. The defendant swore that he demanded and took the goods as security for the debt which he was seeking to collect; but the complainant said nothing as to this.

Held, MEREDITH, C.J., dissenting, that there was no evidence of intent to steal, and the conviction should be quashed.

W. R. P. Parker, for the defendant.

J. R. Cartwright, Q.C., for the Crown.

WARREN v. VAN NORMAN.

Way—Right of—Prescription—Termini—Slight deviations—Interruption—Appeal—Admission of new evidence—Erection of gate across way.

The decision of STREET, J., 29 O. R. 84, *ante* 66, affirmed on appeal.

The plaintiff, having omitted to give formal proof of his title at the trial, was allowed to supply it upon the appeal.

Upon the plaintiff's assent, the judgment below was varied by awarding to the defendant leave to erect and maintain a gate across the end of the way in question.

Clendenan v. *Blatchford*, 15 O. R. 285, referred to.

Britton, Q.C., for the defendant.

J. A. Hutcheson, for the plaintiff.

[ROSE, J., MACMAHON, J.

DANIELS v. DANIELS.

Chattel mortgage—Renewal statement—Assignment between making and filing—R. S. O. c. 148, s. 18.

A chattel mortgage does not cease to be valid as against

creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment.

Construction of s. 18 of R. S. O. c. 148.

J. Bicknell and *A. Bicknell*, for the plaintiff.

Brewster, for the defendant William Daniels.

S. C. Smoke, for the defendant Stockton.

[MacMahon, J., 27th June, 1898.

LEGGATT v. BROWN.

Contract—Consideration in part illegal—Stifling prosecution.

The manager of the business of an insolvent firm was arrested and imprisoned on a charge of having procured the firm, while in insolvent circumstances, to transfer certain of its property to another person with intent to defraud the creditors of the firm. After he had been released on bail an offer was made in writing by his wife and her son to the creditors of the firm to pay a certain percentage of their claims, in addition to the dividend to be paid by the estate of the firm, and to withdraw certain actions and procure the abandonment of certain claims, upon certain conditions set out in the offer, one of which was that any creditor accepting the offer should not thereafter, directly or indirectly, institute or be a party to any action or proceeding against the husband in respect of any matter or thing in any wise connected with the affairs or business of the firm. This offer was accepted by the plaintiff and a number of the other creditors. After it was made, the husband was discharged from custody, the informant, one of the creditors, not appearing, and no evidence being offered in support of the charge. Promissory notes were afterwards made by the wife and her son in favour of the creditors for the stipulated percentage. In an action by one of the creditors upon some of the notes:—

Held, that, although not stated in express terms, one object of the defendants in making their offer was to procure

the stifling of the prosecution of the charge made against the husband; that it was in accordance with the concluded agreement made by the defendants with the plaintiff and the other creditors that no evidence was offered on the pending charge, which was consequently dismissed; and that the notes sued upon, having been given on the illegal agreement thus entered into, could not be enforced.

Rawlings v. *Coal Consumers' Association*, 43 L. J. M. C. 111, *Windhill Local Board of Health* v. *Vint*, 45 Ch. D. 351, and *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, followed.

Held, also, that as part of the consideration for the agreement was illegal, the whole was bad.

Lound v. *Grinwade*, 39 Ch. D. at p. 613, referred to.

George Kerr, for the plaintiff.

J. E. O'Meara, for the defendant Patterson.

Wyld, for the defendants Altha Ann Brown and J. W. Baker.

Fripp, for the defendant W. E. Brown.

IN CHAMBERS.

[ROSE, J., 13TH JUNE, 1898.

HAWKE v. O'NEIL.

Jury notice—Striking out—Convenience—Judge in Chambers—Judge at trial.

A jury notice should not be struck out by a Judge in Chambers, upon a motion made before the trial, simply upon the ground that the action can be more conveniently tried without a jury; that is a matter which should be left for the consideration of the Judge presiding when the action comes on for trial.

W. H. Wright, for the plaintiff.

W. Davidson, for the defendant O'Neill.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 27TH JUNE, 1898.

CASE v. BARTLETT.

Mortgage—Unregistered agreement for—Declaration of lien—Registered judgment—Priorities.

Appeal from decision of DUBUC, J., *ante* 153, dismissed with costs.

REGINA v. BUCHANAN.

Criminal law—Criminal Code, s. 645—Omission of foreman of grand jury to place initials opposite names of witnesses—Assault—Consent to fight—Breach of the peace.

Reserved case. The accused was arraigned on an indictment charging an assault occasioning actual bodily harm. Before pleading, his counsel moved to quash the indictment, on the ground that the foreman of the grand jury had not, as required by s. 645 of the Criminal Code, written his initials opposite the names of the witnesses examined before the grand jury. The Judge directed the case to proceed, reserving the question raised for the opinion of the Court, and the accused was found guilty of common assault.

The question reserved for the opinion of the Court was thus stated: "It being shown that the foreman of the grand jury had omitted to write his initials opposite the names indorsed on the back of the indictment, of the witnesses who had been sworn and examined before the grand jury, was that omission fatal to the indictment, and should, on that account, the indictment be quashed?"

Held, that the question should be answered in the negative.

The question seemed to be whether the provision in s. 645 of the Code was imperative or directory only; and that

appeared to be answered by *O'Connel* v. *The Queen*, 11 Cl. & F. 155. The provisions of the Imperial Act 1 & 2 V. c. 37 are similar to those of s. 645; the words of the statute must be taken to be only directory.

A second question was thus stated by the trial Judge: "Was my not instructing the jury that, if they found that the complainant had consented to fight with the prisoner on the occasion when he complained of having been assaulted, there was no offence committed, a non-direction in point of law, sufficient to invalidate the verdict?"

Held, that the question should be answered in the negative. It must be assumed from the case reserved that the fight between the complainant and the prisoner was a fight in the ordinary sense of the word, a contest entered into in a spirit of hostility and anger. If it were, there was a breach of the peace, and an individual cannot by consent destroy the right of the Crown to protect the public and keep the peace: *The Queen* v. *Coney*, 8 Q. B. D. 534.

Conviction affirmed.

Maclean, for the Crown.

Howell, Q.C., for the prisoner.

SCARRY v. WILSON.

Trustee—Remuneration—Allowance of—Appeal for costs.

The plaintiff, the owner of two parcels of land, having had trouble with her husband, resolved to leave him and live in the United States of America. She consulted a solicitor, and under his advice executed deeds of the lands to the defendant Wilson. She and Wilson were entire strangers to one another. She subsequently became reconciled to her husband and returned to this Province. She began the present action against Wilson and a Mrs. Carcary, alleging that she executed the deeds to Wilson without proper knowledge of their contents and effect; that he had improperly mortgaged the lands to Mrs. Carcary, applying to the plaintiff's benefit only a small part of the moneys raised by the mortgage; and making other charges of misconduct. The statement of claim prayed a reconveyance by Wilson of the lands,

subject to the lien of Mrs. Carcary for so much of the money raised upon the mortgage as the plaintiff admitted to have been applied for her benefit, and for the taking of accounts.

The trial Judge found that Mrs. Carcary was a mortgagee for value, and as against her the action was dismissed with costs.

As to Wilson, the judgment drawn up ordered the reconveyance of the lands, taking of accounts, and payment of any balance, and declared that the Court made no order as to costs between the plaintiff and Wilson.

Wilson by his statement of defence claimed $100 as the remuneration agreed to be paid him for his services in the matter; the trial Judge found that it was agreed that this amount should be paid; but the judgment drawn up declared that on taking the accounts he was to be allowed no remuneration as trustee.

Wilson moved before the full Court to have the judgment varied by striking out the clause depriving him of any remuneration, and inserting a declaration that he was entitled to be allowed the $100, and further that the plaintiff should be ordered to pay his costs as between solicitor and client.

Counsel for the plaintiff contended that the Court could not hear an appeal for costs only, which this was.

Held, that the appeal should be allowed with costs. Wilson was entitled upon the taking of the accounts to have the $100 allowed to him. He was also entitled to costs as between solicitor and client.

The question of costs was only one ground of appeal. There was, besides that, another substantial ground of appeal upon the merits.

"The rule is that you cannot appeal for costs alone. But if a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings on the question of costs along with it, he may succeed with respect to the costs, though he does not succeed on the substantial ground of appeal. A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the

question of costs:" *Attorney-General* v. *Butcher*, 4 Russ. 180; *Fitzgibbon* v. *Scanlan*, 1 Dow 270.

Howell, Q.C., for the plaintiff.

Ewart, Q.C., for the defendant Wilson.

ABELL v. CRAIG.

Sale of goods—Second-hand machine—Construction of agreement—Condition precedent.

County Court appeal. The plaintiffs sued to recover the price of a second-hand horse power and separator bought by the defendant. The document signed by the defendant was an order for the delivery of "one second-hand Woodbury Power and Case Separator, known as Arnason's outfit, the same to be put in good running order by Arnason Bros. by putting in set of cylinder spikes."

After harvest the defendant attempted to use the machine for threshing. A new set of cylinder teeth were supplied for it, and while the defendant was trying to make use of it, men sent by the plaintiffs' agent made repeated efforts to repair and fit it up. At length the defendant notified the agent that he would not keep the machine, and returned it to him.

The plaintiffs then brought this action, and the defendant defended it on the ground that a condition of the sale, that the machine should be put in good running order, had not been fulfilled, and claimed damages for losses sustained.

The County Court Judge held that the sale was subject to a condition which had not been performed, and the plaintiffs were not entitled to recover, so he gave judgment in favour of the defendant. Against this the plaintiffs appealed.

Held, that the appeal should be dismissed with costs.

The order or contract must be construed so as to hold that putting the machine in good running order was a condition, the failure to perform which by the plaintiffs, or their failure to see that Arnason Brothers performed it, gave the defendant a right to repudiate it. Until the machine was in good

running order the defendant was not bound to accept delivery of it, or to pay for it.

It was said that by taking the machine and using it the defendant waived any right to insist on the performance of the condition, but the defendant could not, until he had tried the machine, know whether it was in good running order or not. He objected more than once that it was not, and men were sent by the plaintiffs' agent to put it in order.

After they had worked on it with that object, what could the defendant do but try it again to see if the defects had been removed. It could not be said that he used it for an unreasonable time, or did more than was required to satisfy him that the condition had not been fulfilled, and then he notified the plaintiffs' agent.

Howell, Q.C., for the plaintiffs.

Pitblado, for the defendant.

[9TH JULY, 1898.

REGINA v. HERRELL.

Liquor License Act—Second offence—Sufficiency of evidence—No evidence to prove previous conviction—Bias of magistrate.

Rule *nisi* to quash a conviction of the defendant for a second offence against the Liquor License Act, R. S. M. c. 90. Three objections were taken by the rule:

1. That there was no evidence to sustain the conviction. It was argued that there was no evidence to identify the liquor sworn by the constable to be intoxicating liquor, with the liquor which was in the bottle which a boy delivered to the prosecutor as having been bought by him at the shop of the defendant.

Held, that the evidence upon this was not satisfactory, but it could not be said there was no evidence on which the magistrate could act, and unless that could be held, his finding could not be interfered with: *Regina* v. *Grannis*, 5 Man. L. R. 153.

2. That there was no evidence to prove a previous conviction.

The information was laid charging a previous conviction, but the record of the depositions and proceedings before the magistrate contained nothing on the subject. Among the papers returned under the *certiorari*, there was a certificate which, it was contended, was sufficient under s. 200 of the Liquor License Act to prove the previous conviction. But there was no evidence proving the identity of the defendant with the person named in the certificate.

Held, that when the conviction was of a second offence, with the increased penalties, the proceedings ought to show either that the accused admitted the previous conviction, or that the fact of such conviction and the identity of the accused were both proved. A magistrate has no right to act upon any personal knowledge he might be supposed to have; he must act upon evidence adduced before him. There was a total absence of evidence that the defendant, the particular person then before the magistrate on a charge, had ever been convicted. There was no evidence of identity, and in the absence of an admission of the fact by the defendant, that was essential.

3. That the magistrate was disqualified on account of bias and interest.

It was alleged that the prosecution was at the instance of a society known as the Women's Christian Temperance Union, of which the magistrate was an honorary member, and to the funds of which he subscribed. It appeared, however, that, although the society on one occasion supplied the constable with money to be used in taking steps to discover cases of alleged illegal liquor selling, the society were not prosecutors in this case, but the prosecution was brought by the constable under instructions from the mayor.

Held, that where the magistrate has no pecuniary or private interest in the subject matter of the controversy, and there is no sufficient evidence of actual bias, the question is whether he is so far connected with one of the parties as to be adjudging in what is directly or indirectly his own cause. There was no such connection in this instance.

Conviction quashed. It could not be amended so as to make it a conviction for a first offence.

Ashbaugh, for the defendant.

Maclean, for the magistrate.

Supreme Court of Canada.

ONTARIO.] [14TH JUNE, 1898.

ANDERSON v. GRAND TRUNK R. W. CO.

Railways—Use of railway premises—Trespass—Passenger—Invitation—Negligence—Station—Evidence.

At a place called Lucan Crossing, on the line of the Grand Trunk Railway, passengers are received and set down, tickets being sold to and from such place. There is no regular station, but there is a small building, part of which is used for a waiting-room, and no right of way to the public highway is provided, passengers being obliged to cross the railway lines. M., on returning from London to a place about three miles from Lucan, found he could only get to the latter place, owing to a violent snow-storm, and arriving there started to walk to his home, but in going along the railway to reach the highway he was struck by a train and killed. In an action by the administrators of his estate for damages:—

Held, that, notwithstanding the user for many years of the lines by passengers for egress from the train, M. could not be said to be on the railway by invitation or license of the company, and the action would not lie.

Judgment of the Court of Appeal, 24 A. R. 672, 17 Occ. N. 392, reversed.

Osler, Q.C., for the appellants.

Aylesworth, Q.C., for the respondents.

JORDAN v. PROVINCIAL PROVIDENT INSTITUTION.

Life insurance—Application—Representation—Materiality—Good faith—55 V. c. 39, s. 33 (2), (3).

The provisions of s.-s. 2 of s. 33 of the Ontario Insurance Corporations Act, 1892, requiring any condition or warranty

indorsed on the policy which provides that the contract of insurance shall be avoided by reason of statements in the application, to be limited to cases in which such statements may be material to the contract, do not require the materiality of the statement to appear on the indorsement; but the contract will only be avoided thereby if such statement is subsequently judicially found to be material under the following sub-section.

A misrepresentation in such a statement, if so found to be material, will avoid the policy, notwithstanding that it was made in good faith, and in the conscientious belief that it was true.

Judgment of the Court of Appeal affirmed.

James Reeve, Q.C., and *J. E. Day*, for the appellant.

Osler, Q.C., and *Angus MacMurchy*, for the respondents.

QUEBEC.]

KLOCK v. LINDSAY.

Landlord and tenant—Loss by fire--Negligence—Legal presumption—Rebuttal of—Onus of proof—Lease, construction of—Covenant to return premises in good order—Art. 1629, C. C.

A steam saw mill was totally destroyed by fire, during the term of the lease, whilst in the possession of and occupied by the lessees. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as can be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to show that necessary and usual precautions had been taken for the safety of the premises, a night-watchman kept there making regular rounds, and buckets filled with water kept ready and force pumps provided for use in the event of fire, and they contended that, as the origin of the fire was mysterious and unknown, it must be assumed to have occurred through natural and fortuitous causes, for which they were not responsible. It appeared, however, that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time

than was necessary or usual for the making of his rounds; that during his absence the furnaces were left burning without superintendence; that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered; and that on discovering the fire the watchman failed to make use of the water buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force pumps, before giving the alarm.

Held, that the lessees had not shown any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by Art. 1629 of the Civil Code against the lessees had not been rebutted; and that the evidence showed culpable negligence on the part of the lessees, which rendered them civilly responsible for the loss by fire of the leased premises.

Murphy v. *Labbé*, 27 S. C. R. 126, approved and followed.

Judgment of the Court below affirmed.

KING v. DUPUIS.

Appeal—Jurisdiction—Amount in controversy—Opposition àfin de distraire—Judicial proceeding—Demand in original action—R. S. C. c. 135, s. 29—Contract—Sale of logs—Delivery of possession—Bailment to manufacturer.

An opposition *àfin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and on an appeal to the Supreme Court of Canada from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure, and not the amount demanded by the plaintiff's action or for which the execution issued.

Turcotte v. *Dansereau*, 26 S. C. R. 578, followed.

McCorkill v. *Knight*, 3 S. C. R. 233, Cass. Dig., 2nd ed., 694, referred to.

Champoux v. *Lapierre*, Cass. Dig., 2nd ed., 426, and *Gendron* v. *McDougall*, Cass. Dig., 2nd ed., 429, discussed and distinguished.

K. B. made an agreement with T. for the purchase of the output of his saw mill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled, and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification, and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent.; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates showing receipts of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be their property, and should be stamped with their name; and that all advances should bear interest at the rate of seven per cent. Before the river drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller, under which all movable property in his possession was seized, including a quantity of the logs in question on the drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured at the seller's mill.

Held, TASCHEREAU, J., expressing no opinion, that the contract so made between the parties constituted a sale of

the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured.

Judgment of the Court below reversed.

Fitzpatrick, Q.C., S.-G., and *L. Taschereau*, Q.C., for the appellants.

Belcourt and *Letellier*, for the respondent.

CADIEUX v. MONTREAL GAS CO.

Contract—Notice to cancel—Gas supply shut off for non-payment of gas bill on other premises—Powers of gas company—12 V. c. 182.

An agreement to furnish gas contained an express provision that "either of the contracting parties shall have the right to cancel this contract by giving twenty-four hours' notice in writing." Notices were sent in writing to the consumer that his gas would be shut off at a certain number on a street named, unless he paid arrears of gas bills due upon another property.

Held, that such notices could not be considered as notices given under the contract for the purpose of cancelling it.

The Act to amend the Act incorporating the New City Gas Company of Montreal and to extend its powers, 12 V. c. 182, provides:

"That if any person or persons, company or companies, or body corporate, supplied with gas by the company, shall neglect to pay any rate, rent, or charge due to the New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours' previous notice, to stop the gas from entering the premises, service pipes, or lamps of any such person, company, or body, by cutting off the service pipe or pipes, or by such other means as the said company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent Court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from

any house, building, or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours' previous notice to the occupier or person in charge, to enter into any such house, building, or premises between the hours of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take, and carry away any pipe, meter, cock, branch, lamp, fittings, or apparatus, the property of and belonging to the said company."

Held, TASCHEREAU, J., dissenting, that the powers given by the clause quoted were exorbitant, and must be construed strictly; that the company had not been thereby vested with power to shut off gas from all the buildings and premises of the same proprietor or occupant, when in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge" indicated that only premises so occupied and in default should suffer.

Judgment of the Court below reversed.

St. Jean, for the appellant.

Brosseau, for the respondents.

NOVA SCOTIA.]

MULCAHEY v. ARCHIBALD.

Bankruptcy and insolvency—Transfer of property—Delaying or defeating creditors—13 Eliz. c. 5.

A transfer of property to a creditor for valuable consideration, to prevent its being seized under execution at the suit of another creditor, and with intent to delay the latter in his remedies, or defeat him altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

Judgment of the Court below reversed.

Harris, Q.C., for the appellants.

McInnes, for the respondent.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, J., STREET, J., 20TH JULY, 1898.

In re MATHIEU.

Parent and child—Custody of infant—Rights of father—Discretion of Court.

Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child, merely because the wife prefers to live away from him, and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. It must be the aim of the Court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the Court over the custody of infants, by R. S. O. c. 168, s. 1, is to be exercised as a shield for the wife, where a shield is required against a husband with whom she cannot properly be required to live; it is not to be exercised as a weapon put into the hands of a wife with which she may compel an unoffending husband to live where she sees fit.

In re Agar Ellis, 10 Ch. D. 71, and *In re Newton*, [1896] 1 Ch. 740, specially referred to.

And where a wife, without any other reason than that she was tired of living in the country to which her husband had taken her, left him and returned to her mother's house, taking with her their daughter, aged five years, the Court made an order giving the custody of the child to the father, and allowing the mother access at reasonable times.

F. C. Cooke, for the father.

A. D. Crooks, for the mother.

[25TH JULY, 1898.

JUSTIN v. GOODISON.

Surrogate Courts—Removal of cause into High Court—Appeal from order made before removal.

Immediately upon the making of an order removing a cause or matter from a Surrogate Court into the High Court under s. 34 of the Surrogate Courts Act, R. S. O. c. 59, such cause or matter becomes an action in the High Court and ceases to be a cause or matter in the Surrogate Court; and therefore an appeal under s. 36 of the Act from an order made in the Surrogate Court, before the removal, cannot be entertained if launched after the removal. The practice to be followed is the practice prescribed in High Court proceedings.

Harris v. *Judge*, [1892] 2 Q. B. 565, *Duke* v. *Davis*, [1893] 2 Q. B. 107, and *Doll* v. *Howard*, 11 Man. L. R. 21, followed.

Justin, for the plaintiffs.

R. U. McPherson, for the defendant.

[30TH JULY, 1898.

DONALDSON v. WHERRY.

County Court—Order in term—Reversal of verdict—Jurisdiction—Rule 615—Appeal to High Court—R.S.O. c. 55, s. 51—Landlord and tenant—Co-tenants—Release of one—Agreement—Consideration—Principal and surety—Discharge of principal—Effect on surety—Reservation of remedies.

In a County Court action tried with a jury, a verdict was found for the defendant and judgment in his favour ordered by the trial Judge. Upon motion by the plaintiff to set aside the verdict and judgment and to enter judgment for the plaintiff or for a new trial, the County Court, in term, made an order setting aside the verdict and judgment and ordering judgment to be entered for the plaintiff.

Held, that, under the provisions of s. 51 of the County Courts Act, R. S. O. c. 55, an appeal lay by the defendant

from the order of the County Court in term to a Divisional Court of the High Court.

In order to put an end to a sealed contract for a tenancy and to discharge one of two tenants from his obligation to pay past or future rent thereunder, there must be something more than an agreement between the tenants, though made in the presence of the landlord, that one of them is to pay the amounts overdue and accruing; there must be a consideration and an agreement to discharge.

A discharge of the debtor by his creditor, with a reservation of remedies against the debtor's surety, operates merely as a covenant not to sue, and does not operate as a release of the surety.

The County Court Judge, in term, had jurisdiction, under Rule 615, to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary to finally determine the questions in dispute.

W. C. McKay, for the plaintiff.

Mulvey, for the defendant Wherry.

[3RD AUGUST, 1898.

In re SOLICITORS.

Solicitor—Retainer—Joint or several—Severance of defence—Apportionment of costs.

Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the Court will look into the facts of the case to discover the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors to the solicitor to whom it was given, but it may be taken distributively.

And, upon the facts of this case, the client whom the solicitor sought to charge with the whole costs of the defence to an action conducted up to a certain stage jointly on behalf of this client and another, two of the defendants in the action, and afterwards on behalf of this client alone, and by a new solicitor on behalf of the other, was held liable for

only one-half of the joint costs during the time that the two clients were represented by the same solicitor, but thereafter for the whole of the costs reasonably and properly incurred by such solicitor.

Aylesworth, Q.C., for the solicitors.

J. E. Jones, for Jane S. Fletcher.

[BOYD, C., 12TH APRIL, 1898.

CANADA PERMANENT L. & S. CO. v. TRADERS' BANK OF CANADA.

Fixtures—Plant and machinery—Mortgage—Agreement for security—Subsequent mortgage—Chattel mortgage—Constructive attachment—Notice.

The plaintiffs were mortgagees from a manufacturing company, and their mortgage, in addition to the land and premises, included "all the plant and machinery now upon or hereafter placed upon said land, all of which plant and machinery are to be considered as fixtures for the purpose of this mortgage." It was provided by the mortgage deed "that none of the machinery . . . will be removed during the currency of this mortgage," and, after the covenant to insure, "the foregoing covenant to insure shall apply to machinery as well as to buildings, and the company shall have a first lien," etc. The mortgage deed was duly registered.

The defendants were assignees of a subsequent mortgage, which included the plant and machinery in similar terms, but subject to the plaintiffs' mortgage, and were also mortgagees under a chattel mortgage covering "all the machinery and plant on the said premises," and most of the machines.

In an action for a declaration that the plaintiffs had a lien on certain machines, and for an injunction to restrain the defendants from removing them:—

Held, that all the chattels of the nature of plant or machinery put upon the premises were constructively converted the fixtures for the purposes of the security; that the things not structurally affixed were constructively affixed, and the

onus of proving that was discharged by proving the agreement in the mortgage; that the second mortgage having been made subject to the first, the presumption of law was that there was notice of the prior one, which continued when the chattel mortgage was taken; and that the defendants were in no better position than the mortgagors, and, as the latter could not remove the plant and machinery, the defendants, holding with notice, were equally bound.

S. H. Blake, Q.C., and *C. J. Leonard*, for the plaintiffs.

James Parkes, for the defendants.

[MEREDITH, C. J., 16TH JULY, 1898.

MULLIN v. MACKLIN.

Deed—Construction—Habendum—Estate—Survivorship.

Special case stated for the opinion of the Court as to the construction of an indenture dated 30th November, 1843, made between David Farley, of the first part, and James Mullin and wife, of the second part, the questions being: (1) Which of the plaintiffs and defendants were on the 25th April, 1898, entitled to any interest in the lands conveyed by the indenture referred to; (2) what estate did they take, and in what proportions. The indenture contained no recitals. The grant was to Mullin and his wife, *habendum* unto them during the term of their natural lives and the natural life of the survivor of them, to the only proper use and behoof of them during the term aforesaid, and, from and immediately after the termination of the estate and interest limited to them, to and amongst all and every the surviving child and children of the aforesaid, equally to be held amongst them if more than one, and if but one, then the whole to such one, and of the several and respective heirs of the bodies of such survivor or survivors lawfully issuing, forever; with full power to sell and convey their portions to each other. The only covenant was for quiet enjoyment, and it was with James Mullin and his wife and their heirs. James Mullin died on the 24th June, 1876, and his wife on the 10th January, 1898. They had eight

children. Four survived their father, and died in the lifetime of their mother, all but one leaving issue. The other four survived their mother, and all but one were now living. That one, David, died on the 11th April, 1898, without issue, but having made a will and appointed an executor.

Held, that only the children who survived the wife were entitled to take, and they took each an undivided one-fourth in fee tail; and David having died without issue, the estate limited to him was thereby determined, and his interest remained in the grantor.

Logie, for the plaintiff.

Bruce, Q.C., for the defendant Macklin.

A. J. Boyd, for the other defendants.

[FERGUSON, J., 16TH JULY, 1898.

ATKINSON v. CITY OF CHATHAM.

Municipal corporations—Highway—Obstruction—Telephone pole—Non-repair—Runaway horses—Liability—Notice—Contributory negligence—Indemnity—Telephone company—Erection of poles—Sanction of corporation—Damages.

A city highway, sixty-six feet wide, had upon it, near the angle formed by a sharp turn in the road, a telephone pole, planted twelve feet from the centre line, and so far from the sidewalk that there was a beaten track for carriages between the two. The horses attached to a sleigh, which was being driven up and down this highway for the pleasure of the occupants, in daylight, ran away, and their driver lost control of them when approaching the pole, but at some distance from it, and before reaching the angle. In making the turn the horses and sleigh described a curve and brought the sleigh against the pole, overturning the sleigh, whereby the horses and sleigh were damaged, and bodily injury was caused to one of the occupants.

Held, that the pole was an obstruction upon the highway, which at this point, from this cause alone, was out of repair and not in good or reasonable repair; and the city corporation, having notice and knowledge of the obstruction, and

also of its dangerous character, and there being no contributory negligence, were liable in damages for the injuries sustained.

Sherwood v. *City of Hamilton*, 37 U. C. R. 410, followed.

Foley v. *Township of East Flamborough*, 29 O. R. 139, distinguished.

Driving a horse that had before run away, as one of a pair of horses, was not of itself negligence contributing to the disaster.

Held, also, upon the evidence, that the pole was planted where it stood under the superintendence of the corporation and with their sanction, and they could not recover indemnity from the telephone company by whom it was erected.

Quantum of plaintiffs' damages considered.

Atkinson, Q.C., and *C. R. Atkinson*, for the plaintiffs.

Douglas, Q.C., and *Aylesworth*, Q.C., for the defendants.

M. Wilson, Q.C., for the telephone company, third parties.

IN CHAMBERS.

[MEREDITH, C. J., 28TH JULY, 1898.

In re McGIBBON v. EAGER.

Prohibition—Division Court—Assignment of annuity—Condition of will—Action against executor—Equitable claim—Account—Jurisdiction.

Motion by the defendants for prohibition to the 10th Division Court in the county of York.

The action was brought by the plaintiff as assignee of the undivided half of an annuity payable to the defendant McFarran under the will of Thomas McFarran, to recover from the defendant Eager, the surviving executor and trustee under the will, the sum of $70 and interest, as the balance of the annuity due to the plaintiff.

By the will $2,000 was bequeathed to the executors and trustees, in trust, to be invested by them and the interest and profits to be held upon trust to pay the same to the defendant McFarran annually, or semi-annually, during his natural

life, with a provision that in the event of the creditors of the annuitant instituting any action at law or suit in equity, or taking any proceedings whatever to recover the annuity, the bequest was to be null and void, and the trustees were to cease to pay the annuity to the annuitant.

On the 27th July, 1888, the defendant McFarran, by an instrument in writing under seal, assigned to the plaintiff the one-half of the annuity until $250 with interest should be fully paid and satisfied.

The $70 sued for was what remained of the $250, after crediting various sums which had been paid to the plaintiff by the defendant Eager out of the annuity.

Held, that as the validity of the bequest was not disputed, but admitted, and no question had been raised as to the validity of the condition in the will, the jurisdiction of the Division Court was not ousted by s. 71 (5) of the Division Courts Act.

2. That the plaintiff was not in the position of a creditor of the annuitant seeking to recover the annuity as part of the property of his debtor; his claim was not as a creditor, but as assignee, of the annuitant; and there was nothing in the will which forbade the assignment of the annuity by the annuitant as security for a debt.

3. That the Division Court had jurisdiction to entertain an equitable claim of this kind.

In re Legarie v. *Canada Loan and Banking Co.*, 11 P. R. 512, followed.

T. A. Gibson, for the defendants.

J. Bicknell, for the plaintiff.

[ROSE, J., 16TH JUNE, 1898.

SLATTERY v. DUN.

Security for costs—Libel—Newspaper—Commercial agency bulletin—R.S.O. c. 68, s. 1.

A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency,

for the purpose of giving the information required by such subscribers, is a "newspaper," and "printed for sale," within the meaning of s. 1 of R. S. O. c. 68; and the publishers are, therefore, in an action for libel brought against them, entitled to the benefit of the provisions as to security for costs contained in s. 10.

W. H. P. Clement, for the plaintiff.

Wallace Nesbitt, for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

IN CHAMBERS.

[McLeod, J., 20th July, 1898.

CARLING BREWING AND MALTING CO. v. FAIRWEATHER.

Arrest—Affidavit to hold to bail—Variance from words of statute—Goods bargained and sold.

The defendant was arrested and held to bail; whereupon he obtained a summons for the plaintiffs to show cause why the arrest should not be set aside upon the ground that the affidavit to hold to bail was bad, (1) in that it did not cover the provisions of 59 V. c. 28, s. 1, under which it was made and (2) that it joined the cause of action for goods bargained and sold with the cause of action for goods sold and delivered, without stating upon which cause of action, or how much upon one or the other, the amount claimed was due and owing.

The following was the paragraph of the affidavit objected to: "That G. Warren Fairweather, of the city and county of Saint John and Province of New Brunswick, merchant,

is *justly and truly indebted* to the Carling Brewing and Malting Company, Limited, in the sum of $2,290.99, for *goods bargained and sold and goods sold and delivered* to the said G. Warren Fairweather by the said The Carling Brewing and Malting Company, Limited, at his request."

Held, that the affidavit was bad, because (1) the words *justly and truly indebted* are not equivalent in their meaning to the words of 59 V. c. 28, s. 1, *justly due*; and (2) a defendant cannot be held to bail in an action for *goods bargained and sold*; and the joining of the cause of action of *goods sold and delivered* with the cause of action of *goods bargained and sold* did not cure the defect, as it could not be ascertained upon which claim the arrest was made, or how much was due and owing upon one or the other.

Ordered accordingly.

Hopkins v. *Vaughan*, 12 East 398, referred to.

J. D. Hazen, Q.C., and *E. P. Raymond*, for the plaintiffs.

W. Watson Allen, for the defendant.

[1st August, 1898.

CLARKE v. WEBBER.

Bankruptcy and insolvency—Assignee for benefit of creditors—Action brought in name of—Statute of Frauds.

On review from the Parish Court of St. Stephen.

In this matter the plaintiff, as assignee of F. and M. under the Act respecting Assignments and Preferences of Insolvent Persons, 58 V. c. 6, sued in his own name. The defendant submitted that this could not be done.

The claim was founded upon the sale of certain goods.

Held, that the action was properly brought in the name of the assignee; but, as the amount sued for was more than $40, the plaintiff must be nonsuited, it appearing that s. 4 of the Statute of Frauds, C. S. N. B. c. 97, had not been complied with.

Geo. J. Clarke, for the plaintiff.

W. H. Trueman, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 27TH JUNE, 1898.

GRAHAM v. BRITISH CANADIAN L. & I. CO.

Will—Power to sell, but not to mortgage—Fraudulent scheme to carry out mortgage—Cloud on title of beneficiaries—Lien of mortgagees for amounts paid for taxes.

Both the plaintiffs and defendants appealed from the decision of TAYLOR, C.J., *ante* 34.

The appeal of the defendants was dismissed with costs, that of the plaintiffs allowed with costs. The judgment appealed from set aside, and a judgment ordered to be entered simply declaring that the mortgages in question were fraudulent and void as against the plaintiffs and not a charge upon their estate and interest in the lands in question in the action. The plaintiffs to have the costs of the action.

The defendants were not entitled to a lien for the amounts paid for taxes.

DAY v. RUTLEDGE.

Mortgage—Purchase of land at tax sale by mortgagor's wife—Fraudulent schemes—Foreclosure—Liability of assignee of purchaser at tax sale—Lien for taxes paid.

Upon an appeal by the defendant Lawlor from the decision of DUBUC, J., *ante* 150, and an appeal by the plaintiff against the allowance of the lien for taxes and purchase money, the judgment was varied by striking out the clause declaring that Lawlor held as trustee for his co-defendants, and by substituting therefor the declaration that any title to the lands in question which Lawlor took or held under the deed set up was held by him subject to the plaintiff's

mortgage; and the clause in the judgment giving the lien was struck out; the defendant Lawlor to pay the costs of both appeals.

Culver, Q.C., and *Mulock*, Q.C., for the plaintiff.

Ewart, Q.C. and *Wilson* for the defendant Lawlor.

[9TH JULY, 1898.

QUINTAL v. CHALMERS.

Sale of goods—Sale of oats by sample—Certificates of inspection—Trial—Right to reply—Erroneous refusal of—New trial nevertheless refused.

The plaintiff by his statement of claim alleged that the defendants agreed to sell to him a certain quantity of No. 1 white oats and No. 2 white oats, f.o.b. at Manitou, and warranted that the quality should be such as would be found by the inspector at Fort William to be equal to samples supplied, and that the plaintiff paid to the defendants a certain sum upon the defendants' representation that the specified quantity of No. 2 white oats had been placed on board at Manitou; that the defendants did not deliver the same, but, in assumed compliance with their contract, delivered certain oats, which reached Fort William after the advance of the money, and were found by the inspector not to be equal to sample.

It appeared, however, that the contract was not as alleged, but for the delivery of "white oats" and "feed oats" equal to sample. The contract was made by correspondence, in which the plaintiff's proposal that the oats should be paid for on arrival at Fort William, provided they were found by the inspector equal to sample, was not accepted by the defendants, but the stipulation of the defendants that they would guarantee them equal to sample, and that they should be paid for on presentation of drafts with bills of lading, was accepted by the plaintiff.

Though the plaintiff failed to prove the contract set up by him, the trial proceeded upon the basis of the real contract, and the main question was whether the "feed oats"

were equal to the sample. A verdict was entered for the defendants. The plaintiff moved for a new trial upon the ground that the Judge erroneously instructed the jury in telling them that the grading of the oats by the inspector at Fort William had nothing to do with the matter, and that there was no legal evidence that the person who made the certificates had ever seen the oats, and in telling them that it was only upon certain letters of defendants that the question of the oats being equal to sample should be answered.

The plaintiff asserted that the sample of "feed oats" was one that would not be considered in the trade to be "mixed," but a quality of "white."

The certificates were put in evidence by the defendants' counsel on cross-examination of the inspector, and the plaintiff contended that, while not being evidence which the plaintiff could have given, they were some evidence of the character of the oats delivered, and, being issued by an official in the course of his duty, they should be presumed to be correct.

Held, that as the defendants had not accepted the condition that the oats should be found by the inspector to be equal to the sample, and as the condition was only that they should be so in fact, the trial Judge was correct in telling the jury that the grading at Fort William had nothing to do with the case, as the contract expressly excluded the grading. The contract was not for oats of any official standard or grade, except as indicated by the word "feed," which the evidence showed to be a term applicable to white, black, or mixed oats. The main condition was that they should be equal to sample, and the parties were not bound by any determination of the official inspector as to how they should be classed. The trial Judge properly told the jury that the certificates, put in as they had been, were evidence for their consideration, though, with equal propriety, he called their attention to the fact that there was no evidence that the person who issued the certificates had seen the oats. It did not appear that there could be any presumption from the official position of the persons who made the inspection or issued the certificates, because they had no duty to settle

the quality or grade of the oats for the purpose of the contract between the parties.

A question was raised with regard to the ruling of the Judge as to the order in which counsel should address the jury.

The defendants called no witnesses, but the plaintiff's counsel claimed a right to reply, on the ground that the defendants had put in evidence certain documents during the cross-examination of the plaintiff's witnesses.

The trial Judge refused the claim, ruling that the defendants' counsel should have a general reply.

Held, that the case came within the rule stated in Best on the Right to Begin and Reply, s. 132, as a case in which the defendants had put in evidence, although this was done during the course of the cross-examination of a witness of the plaintiff, and that the plaintiff's counsel should have been allowed the reply.

After a discussion of the evidence, the Court held that the plaintiff had suffered nothing from the order in which counsel addressed the jury, for the defendants were entitled to the verdict.

Motion dismissed with costs.

Howell, Q.C., for the plaintiff.

Ewart, Q.C., for the defendants.

LAWLOR v. NICOL.

Wheat—Storage of in elevator—Bailment or sale—Statute of Frauds.

County Court appeal. The plaintiff sued to recover the value of grain alleged to have been delivered to the defendants for storage on the plaintiff's account, delivery of which he had demanded and been refused.

The defendants denied their liability for certain parcels of grain specified, alleging that they had not been delivered to them by the plaintiff, and they paid into Court a certain sum as sufficient for other parcels.

At the trial the plaintiff asked leave to amend his statement by alleging a sale and delivery to the defendants at a price called "38 cents and the rise," a rise to 67 cents, demand for payment at that price, and refusal to pay.

The amendments were allowed and judgment given for the plaintiff for the full quantity of grain charged for, the price of 38 cents per bushel. The defendants appealed.

The evidence showed that the defendants were buying grain through an agent, Sutherland, and had engaged space in an elevator under the control of one Hatch, into which the grain purchased was to be delivered. Seven different parcels of wheat were delivered by a servant of the plaintiff at the elevator; the plaintiff produced seven tickets acknowledging the receipt and marked "storage." Sutherland had offered to give "38 cents and the rise."

The defendant T. Nicol swore that when the plaintiff produced the tickets, he asserted that he had that much wheat in store. Subsequently the plaintiff wrote the defendants a letter in which he asserted that he had tickets for wheat "stored" in the elevator, and asked the defendants to make an offer for the wheat "placed in elevator-storage with you."

Held, that the wheat was delivered to the defendants to hold for the plaintiff until the price should be absolutely fixed. Looking at the mode of conducting grain business through elevators, it would require very little evidence to show that under a contract of storage it would not be intended that the identical grain stored should be kept for the party on whose account it was received. The plaintiff's wheat went to a bin with other wheat of the same grade purchased by the defendants or received by them for storage, and the defendants shipped away wheat from time to time out of the bin or delivered wheat to persons for whom they held it. *South Australia Ins. Co.* v. *Randell*, 6 Moo. P. C. N.S. 341, was a distinct decision of the Privy Council that, in such a case, the contract was really one of sale and not of bailment. Whether the party supplying the grain was to receive a price in money, or an equivalent quantity of grain,

or had an option to do either, it was really a sale. The property passed to the warehouseman, and he was to pay in grain or money.

As the property passed to the defendants upon delivery and acceptance of the grain, it was not like a case in which specific goods were stored, the property remaining in the original holder, with an oral agreement for a subsequent sale to the bailee, and the Statute of Frauds offered no bar to the recovery.

Metcalfe and *McPherson*, for the plaintiff.

Wilson and *A. C. Ewart*, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J. A., 31ST AUGUST, 1898.

In re SOUTH ONTARIO PROVINCIAL ELECTION.

PILKEY v. CALDER.

Parliamentary elections—Petition—Status of petitioner—Alien—Voting without right—Affidavit verifying petition—False affidavit—Taking petition off files—Substituting petitioner—Terms.

A motion by the respondent to set aside the petition upon the ground that the petitioner had no status, being an alien, and to take the petition off the files on the ground that the petitioner's affidavit verifying the petition was untrue.

Wallace Nesbitt, for the respondent.

C. J. Holman, for the petitioner, opposed the motion, and asked leave, if necessary, to substitute a petitioner.

OSLER, J.A.—I feel bound to hold, on a fair reading of the petitioner's examination and of the sixth clause of the affidavit filed by him in answer to this motion, that, though he was by birth a British subject, he afterwards renounced his allegiance to the British Crown, and became a citizen of the United States of America, and that he has not since resumed his former nationality. He has, therefore, notwithstanding his British birth, ceased to be a British subject, and is in Canada to be regarded as an alien: Dominion statute

44 V. c. 13, s. 9. Therefore, not being a subject of Her Majesty by birth or naturalization, he was, though his name appeared on the voters' list, not a person who was entitled to vote at the election. It appears to me to follow that his status as petitioner is destroyed. He was not a person entitled to vote, and, though he did in fact vote, his vote is shewn to be a bad vote, and one which must inevitably be struck out on a scrutiny, so that he ceases to have the character of a voter at the election. I do not think the Act intends that one who has voted without having a right to do so may be a good petitioner; and this is the view of the only text writer to whose work I have access at the moment: Leigh and LeMarchant, 200: "Although the words of the Act are 'one or more' (*i.e.*, that a petition may be presented by one or more of the following persons, etc.), it is prudent, provided the petition is presented by electors, to include some larger number as petitioners in case an objection should be taken that, though they had voted, they had no right to vote at the election."

I should have been glad to have had more time at my disposal to consider the question, but, owing to the near approach of the day fixed for trial and for the delivery of particulars, it is necessary that the shape in which the record is to be presented should be settled at once.

I think the objection is well taken, and hold upon the petitioner's own evidence that he is not qualified to be a petitioner. I do so, I must say, without any regret, because from his examination the case appears to be one, of which I fear that there are too many on the files of the Court, where charges have been recklessly made in the petition and vouched by an equally reckless affidavit. I speak of some specific charges which the petitioner has sworn to, but of which he now admits he never knew or heard anything. I cannot conceive how he could have made, or have been asked or permitted by his solicitor to make, such an affidavit.

The result is that under s. 98 an opportunity must be given for substituting another petitioner, which Mr. Holman now applies for leave to do. I think the proper terms to impose are that any person proposed shall verify the petition as required by s. 11 of the Act, so far as it may apply; that

he shall assume liability for the costs hitherto incurred in the petition; and that any consents necessary for treating the deposit of security as applicable to the amended petition, and costs heretofore and hereafter to be incurred, shall be given.

The other objection, viz., that the affidavit being a false one, the petition should be ordered to be taken off the files, is overruled. With regard to some of the charges—the general ones—I have no means of knowing that the affidavit is false, and the examination shews that as to these there was some information, whether true or false, brought to the petitioner's knowledge. It may be that the petitioner believed this information to be true. He says he did, and I cannot see my way to order the petition to be taken off the files by applying the saying, *falsus in uno falsus in omnibus*, to his affidavit.

[Affirmed by the full Court of Appeal, 9th September, 1898.]

HIGH COURT OF JUSTICE.

[FALCONBRIDGE, J., STREET, J., 5TH AUGUST, 1898.

CROSS v. CLEARY.

Contract—Specific performance—Agreement to bequeath estate—Remuneration for maintenance—Implied promise—Annual payments—Arrears—Statute of Limitations.

The plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left:" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told

them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons.

Held, that, apart from the Statute of Frauds, the evidence was not such as the Court could act upon by decreeing specific performance of the alleged agreement in substitution for the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it.

Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a specific promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears.

W. R. Riddell, for the plaintiff.

Aylesworth, Q.C., for the defendants.

[22ND AUGUST, 1898.

In re RENFREW ESTATE.

Revenue—Succession duty—Liability of estate for—Property in another Province—Testator domiciled in another Province—Surrogate Courts—Jurisdiction.

The Judge of a Surrogate Court has jurisdiction to determine whether a particular estate of which probate or administration is sought, is liable or not to pay succession duty, and the amount of such duty; his decision being subject to appeal.

Where a deceased person had his domicil, prior to and at the time of his death, in another Province, and the value of his property in Ontario is under $100,000, although his

whole estate, including property in the Province of his domicil, exceeds $100,000, and his whole estate in this Province is by his will devised and bequeathed to his wife and children, the property in this Province is not liable to pay succession duty.

Judgment of Judge of Surrogate Court of York, *ante* 194, affirmed.

Aylesworth, Q.C., for the Treasurer of Ontario.

D. T. Symons, for the executors.

[6TH SEPTEMBER, 1898.

ROPER v. HOPKINS.

Covenant—Restraint of trade—Breach—Assignment of interest pendente lite.

Upon the plaintiffs becoming the holders of certain shares in an incorporated company carrying on a dairy business, they made an agreement with the defendant, who had formerly been the owner of these shares, by which he was employed as manager of the business and given a right to repurchase the shares, and by which he covenanted, among other things, that, if the agreement should be terminated, he would not "become connected in any way in any similar business carried on by any person or persons, corporation or corporations" in the same municipality. The agreement was terminated about six months later, and about a year after its termination the defendant's son began to carry on a similar business in the same municipality. The defendant, without having any pecuniary interest in this business, and not being employed or paid by his son, but apparently moved solely by a desire to help his son's business, introduced his son to customers of the above-mentioned company, and solicited orders for his son from them.

Held, that, in order to establish a breach of the covenant above quoted, a legal contract of some sort between the de-

fendant and his son must be shewn, and, failing such a contract, it could not be said that the defendant was "connected in any way" with his son's business within the meaning of the contract.

Pending this action, which was brought to restrain the defendant from committing breaches of his agreement, the plaintiffs sold their shares in the company and ceased to have any interest in its affairs, but verbally agreed with the vendees to continue the action, and accordingly brought it to trial.

Held, that from the time the plaintiffs sold their shares they ceased to have any right to relief under the covenant.

Semble, that the benefit of the covenant would be assignable along with the shares.

Judgment of the County Court of York reversed.

Lobb, for the plaintiffs.

J. M. Clark, for the defendant.

[STREET, J., 4TH JUNE, 1898.

CORNWALL WATERWORKS CO. v. TOWN OF CORNWALL.

Waterworks—Municipal corporations—R.S.O. c. 199—Award fixing amount to be paid for property—Passing of by-law to raise amount—Right of corporation to take possession—Time—Agent of corporation—Mortgagee—Parties.

Upon the making of an award fixing the amount to be paid for waterworks upon an arbitration under R. S. O. 199, between a town corporation and a waterworks company, and the passing of a by-law for raising the amount, the corporation is entitled, under s. 62, to the possession of the property, and therefore no action will lie against the corporation to recover the possession so required, nor will an action lie against an agent of the corporation duly appointed to procure possession.

The six months provided for by s. 64, within which the amount must be paid, or the waterworks company may resume possession, must have elapsed before action brought to

recover possession; it is not sufficient that the time should have elapsed at the time the action is tried.

Mortgagees of the waterworks company who were not parties to the arbitration, or referred to in the award, and who had no part in the taking of possession, were not necessary parties to the action.

D. B. Maclennan, Q.C., for the plaintiffs.

Leitch, Q.C., for the town corporation and their agent.

A. Bruce, Q.C., for the mortgagees.

[MEREDITH, J., 29TH JUNE, 1898.

TYTLER v. CANADIAN PACIFIC R. W. CO.

Action—Jurisdiction of Ontario Courts—Tort in another Province—Railway company.

A writ of summons in an action to recover damages against a railway company for negligence which caused the death of the plaintiff's testator in a railway accident in British Columbia, was issued out of the High Court of Justice for Ontario, and was served on the defendants' claims agent in Toronto, in that province. The head office of the railway was in the Province of Quebec, but the company carried on business in Ontario, where there were many hundred miles of its railways, and millions of its capital invested, and where hundreds of its officers and servants resided.

Held, that the action was properly brought in Ontario, and the service of the writ therein was valid.

Tytler, for the plaintiff.

Robinson, Q.C., and *Aylesworth*, Q.C., for the defendants.

[2ND AUGUST, 1898.

In re POWERS AND TOWNSHIP OF CHATHAM.

Municipal corporations—By-law—Repeal—Public Schools Act, R.S.O. c. 292, ss. 38, 39—Alteration of school sections—Township council—County council—Appeal.

A by-law of a township council repealing a former by-law, passed under the provisions of s. 38 of the Public Schools

Act, R. S. O. c. 292, whereby a new rural school section was created from parts of three existing sections, was quashed.

Held, that the repeal was not within the power of the council; that the original by-law could be set aside or altered, or its effect prevented or changed, only by means of an appeal to the county council under s. 39; that the township council's power, once regularly exercised, was exhausted, to revive again only at the expiration of five years.

Aylesworth, Q.C., and *A. B. Carscallen*, for the applicant.

J. S. Fraser, for the township corporation.

IN CHAMBERS.

[ROSE, J., 20TH MAY, 1898.

In re O'NEIL v. HOBBS.

Division Courts—Tort—Payment of money into Court.

In a Division Court action for a tort, money paid into Court by a defendant, in alleged satisfaction of the plaintiff's claim, at once becomes the plaintiff's, but when he proceeds with the action it must, under Rule 170, remain in Court until after judgment is given in the action, when any costs awarded the defendant, after the payment in, must be deducted therefrom.

Where, therefore, after payment into Court by a defendant of a sum of money in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action, and judgment was given in the defendant's favour, prohibition was granted against the enforcement of an order made by the Judge in the Division Court directing the sum so paid in to be paid out to the defendant, and it was intimated that the amount should be paid out to the plaintiff, after deducting the costs awarded to the defendant.

Talbot Macbeth, for the plaintiff.

Toothe, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 26TH AUGUST, 1898.

JOHNSTON v. SULLIVAN.

Specific performance—Evidence—Corroboration.

In a suit for specific performance of an agreement for the sale of land, relief will not be granted unless the evidence of the plaintiff is so corroborated, either by independent testimony or the surrounding circumstances, as to leave no substantial doubt that the defendant's version of the transaction is erroneous and that of the plaintiff correct.

A. A. Stockton, Q.C., and *W. Pugsley*, Q.C., for the plaintiff.

C. N. Skinner, Q.C., for the defendant.

CALHOUN v. BREWSTER.

Specific performance—Evidence—Corroboration—Discretion—Conduct of parties—Costs.

In a suit for the specific performance of an alleged agreement for the sale of an interest in land, the evidence must satisfactorily establish that the agreement was finally concluded, that it is certain in all its essential details, and substantially as alleged in the bill.

The exercise of the jurisdiction to order specific performance of an agreement is not a matter of right in the party seeking relief, but of discretion in the Court, to be governed by fixed rules and principles, and the conduct of the party applying for relief is an important element for consideration.

Relief will not be granted where the agreement is denied by the defendant unless the plaintiff's evidence is so corroborated, either by the testimony of other witnesses or the surrounding circumstances, as to leave no substantial doubt that the defendant is in error.

Where in a suit for specific performance of an alleged agreement for the sale of land, the evidence shows that the parties were in negotiation, but all the terms had not been finally settled, and the plaintiff considered that the agreement was concluded, the bill was dismissed without costs.

W. B. Chandler and *M. G. Teed,* for the plaintiff.

H. A. Powell, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 18TH AUGUST, 1898.

ALLAN v. CLOUGHER.

Costs—Scale of—Jurisdiction of County Court—Action on promissory note—Amount in controversy.

Application for a direction to the Master as to the scale on which the costs of the action were to be taxed. The action was at law and brought in the Queen's Bench and tried under the old practice. The declaration was upon two promissory notes made by the defendant, payable on demand, and upon the common counts. Particulars of claim set up only the two notes and interest, amounting to $532.47. The pleas were, to each note, *non fecit,* non-presentment, payment, and waiver, and to the common counts, never indebted and payment. The plaintiffs recovered a verdict for $101.09. No certificate for costs was granted.

The plaintiffs contended that it appeared from the evidence that the action was really one for the balance of an

unsettled account, exceeding in the whole $400, and on that account, not of the proper competence of a County Court.

Held, that the plaintiffs were entitled to recover only County Court costs, and the defendant was entitled to tax his costs of the action as between attorney and client, and to set off against the plaintiffs' costs and verdict so much of such costs of defence as exceeded the taxable costs of defence which would have been incurred in the County Court.

The defendant must be allowed the costs of the application. Upon the face of the record, the action was within the proper competence of a County Court. That Court could have entertained an action upon promissory notes where the amount or balance payable did not exceed $400. For all that the record showed the amount recovered might have been clearly ascertained and settled between the parties.

Miller v. *Beaver Mutual Fire Ins. Co.*, 15 C. P. 75, *Gardner* v. *Stoddard*, Dra. 101, and *Bonter* v. *Pretty*, 9 C. P. 273, referred to.

Phippen, for the plaintiffs.

Allen and *Cameron*, for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[Bole, Lo. J., 1st September, 1898.

HADDEN v. HADDEN.

Foreign judgment—Action on—Arrears of alimony.

Action to recover $1,100.35 for arrears of alimony, with interest, consented, agreed, and adjudged to be paid by the defendant to the plaintiff by an order or judgment of the High Court of Justice for Ontario dated the 9th November,

1891, and the certificate of the Master made in pursuance thereof dated the 22nd January, 1892.

Held, that the judgment, so far as it related to the arrears due and payable thereunder, was a final judgment, and the plaintiff was entitled to succeed in her action thereon.

Abouloff v. *Oppenheimer*, 10 Q. B. D. 305; *Nouvion* v. *Freeman*, 15 App. Cas. 9; *Re South American and Mexican Co.*, 12 R. 1; *Re Benstead*, [1893] 1 Q. B. 199; *Magurn* v. *Magurn*, 3 O. R. 577; *Lee* v. *Lee*, 27 O. R. 193; *Wheeler* v. *Wheeler*, 17 P. R. 45; *Aldrich* v. *Aldrich*, 24 O. R. 130; *Bailey* v. *Bailey*, 13 Q. B. D. 855, discussed.

Morrison and *Dockrill*, for the plaintiff.

Howay and *Reid*, for the defendant.

Supreme Court of Canada.

ONTARIO.] [20TH MAY, 1898.

TEW v. NEILL.

Appeal—Jurisdiction—Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands—60 & 61 V. c. 34.

While an action to set aside as fraudulent or void a second mortgage on lands for $2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceds of the sale, amounting to $270, to the defendants as subsequent incumbrancers.

Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendants to pay to the plaintiff, as assignee for the benefit of creditors, the amount of $270, so received by them thereunder, and this judgment was affirmed by the Court of Appeal on the 15th March, 1898.

Upon an application to allow an appeal bond on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 V. c. 34, but they were overruled by a Judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question, and the appeal was accordingly proceeded with, and the appeal case and factums printed and delivered.

On motion to quash for want of jurisdiction, when the appeal was called for hearing:—

Held, that the case did not involve a question of title to real estate or any interest therein, but was merely a controversy in relation to an amount less than the sum or value of $1,000, and that the Act 60 & 61 V. c. 34 prohibited an appeal to the Supreme Court of Canada.

The appeal was quashed with costs.

Wallace Nesbitt and *W. J. Clark,* for the respondents.

Hamilton Cassels, for the appellant.

[14TH JUNE, 1898.

BOULTON v. BOULTON.

Estoppel—Conveyance by married woman—Agreement—Recital.

B., a married woman, in order to carry out an agreement between her husband and his creditor, consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on the farm and of indemnity against her personal liability on a mortgage against the farm. The conveyance, agreement, and bill of sale of the chattels were all executed on the same day. The agreement, to which B. was not a party, contained a recital that the husband was owner of the said chattels, but gave the creditor no security upon them. The chattels having subsequently been seized under execution against the husband, it was claimed, in interpleader proceedings, that the bill of sale was in fraud of the creditor.

Held, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that, as it appeared that the husband expressly refused to assign the chattels to his creditor, there was nothing to prevent him from transferring them to his wife; and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage.

Wallace Nesbitt and *W. J. Clark,* for the appellants.

F. E. O'Flynn, for the respondent.

QUEBEC.]

GRAND TRUNK R. W. CO. v. COUPAL.

Railways—Expropriation of lands—Arbitration—Evidence—Findings of fact—Duty of appellate Court—51 V. c. 29.

On an arbitration arising out of the expropriation of lands under the provisions of the Railway Act, the majority of the arbitrators appeared to have made their computation

of the amount of the indemnity awarded to the owner of the land, by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court, TASCHEREAU and GIROUARD, JJ., dissenting, that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Lafleur, for the appellants.

Lafontaine, for the respondent.

NOVA SCOTIA.]

MULCAHY v. ARCHIBALD.

Bankruptcy and insolvency—Transfer of property—Delaying or defeating creditors—Existing debt—13 Eliz. c. 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt, and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

Judgment of the Court below reversed.

Harris, Q.C., for the appellants.

McInnis, for the respondent.

MURRAY v. JENKINS.

Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact.

Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of

certain lots of land, through an incorrect representation made to her, and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots, in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her, and was set aside by the Court on the ground of error, as the parties were not *ad idem* as to the subject-matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands.

Judgment of the Court below reversed.

Newcombe, Q.C., for the appellant.

Borden, Q.C., for the respondent.

NEW BRUNSWICK.]

LEA v. WALLACE.

Married woman—Separate property—Conveyance—Contracts—C. S. N. B. c. 72.

Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband and not liable for the payment of his debts, does not, except in the case specially provided for, enlarge her power of disposing of such property or allow her to enter into contracts which at common law would be void.

Moore v. *Jackson*, 22 S. C. R. 218, referred to.

Judgment of the Court below, 33 N. B. Reps. 492, 17 Occ. N. 13, reversed.

Pugsley, Q.C., and *Teed*, for the appellants.

Powell, Q.C., for the respondent.

NORTH-WEST TERRITORIES.]

HEIMINCK v. TOWN OF EDMONTON.

Municipal corporations—Highways—Old trails in Rupert's Land—Substituted roadway—Necessary way—R. S. C. c. 50, s. 108—Reservation in Crown grant—Dedication—User—Estoppel.

The user of old travelled roads or trails over the waste

lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government survey thereof, does not give rise to a presumption that the lands over which they passed were dedicated as public highways.

The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots, and assessed and taxed as private property by the municipality; and a new street, substituted therefor, as shown upon registered plans of sub-division, and laid out upon the ground, had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by letters patent from the Crown.

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the circumstances there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government survey of the Edmonton settlement.

McCaul, Q.C., for the appellant.

Beck, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [20TH SEPTEMBER 1898.

In re SOLICITOR.

Solicitor—Costs—Taxation—Discretion of local officer—Increased counsel fees.

The decision of a Divisional Court, 17 P. R. 461, 17 Occ. N. 185, affirmed on appeal.

W. J. Clark, for the appellant.

C. R. W. Biggar, Q.C., for the solicitor.

HIGH COURT OF JUSTICE.

[FERGUSON, ROBERTSON, MEREDITH, JJ., 2ND JULY, 1898.

BEAULIEU v. COCHRANE.

Libel—Privilege—Malice.

On appeal by the defendants from that portion of the judgment of MACMAHON, J., 29 O. R. 151, *ante* 108, in favour of the plaintiff in respect of the libel in the 10th paragraph of the statement of claim, for $300 and costs:—

Held, that there was no evidence of malice, and in the absence of such evidence the communication was privileged.

Judgment of MACMAHON, J., reversed.

L. G. McCarthy, for the defendants.

A. H. F. Lefroy, for the plaintiff.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 15TH JULY, 1898.

In re BRITISH MORTGAGE LOAN CO.

Prohibition—County Court Judge—Assessment and taxes—Court of Revision—Appeal from—Assessor—Right to appeal—Municipal corporation.

The appeal from the decision of a Court of Revision to the County Court Judge, in a case where such Court allows an appeal against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but the appeal must be by the municipality.

Order of ARMOUR, C.J., refusing to prohibit a County Court Judge from hearing an appeal by an assessor, reversed; MEREDITH, C.J., dissenting.

W. H. Blake, for the company.

Idington, Q.C., for the assessor.

MOORE v. CARBERRY.

Malicious prosecution—Conspiracy—Reasonable and probable cause—Evidence of.

In an action for malicious prosecution, in charging the plaintiff with conspiracy to defraud the defendant of a sow, alleged by the defendant to be his, the laying of the information, the prosecution on the charge, and its dismissal, were proved, and evidence was given by the plaintiff and two others charged with the offence, denying it, while the magistrate stated that, in his judgment, there was no evidence to prove the conspiracy; but the evidence given before him was not produced. Evidence was also given by a neighbour that, before the charge was laid, he informed the defendant that he did not believe the sow to be the defendant's, giving the defendant his reasons therefor, though he thought the defendant honestly believed it to be his. Evidence was also given by the County Crown Attorney that the defendant had laid a number of the facts before him, and that he had drawn up the information, and, though he stated at the trial that he did not think there was much in it, it did not appear that he had so informed the defendant.

A finding by the learned trial Judge, that the absence of reasonable and probable cause had not been shown, was affirmed by the Court; ROSE J., dissenting.

T. J. Blain, for the plaintiff.

Justin, for the defendant.

[1ST AUGUST, 1898.

DOUGLAS v. STEPHENSON.

Libel—Newspaper—Solicitor for municipality—Comments on conduct of—Belief in truth of statements published—Misdirection—New trial.

The discussion of the conduct of a solicitor for a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticize or make fair comments thereon; but the statements on which the criticism or comments are based must be true, and not merely believed to be true.

Where, therefore, in an action for libel for statements published in a newspaper in which comments were made criticizing the plaintiff's conduct as such solicitor, the jury, although they were told that any criticism on the plaintiff's conduct must be based on the truth, were at the same time told that it was sufficient if the statements on which the criticism was founded were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial ordered; MACMAHON, J., dissenting.

Shepley, Q.C., for the plaintiff.

John King, Q.C., for the defendant.

[7TH SEPTEMBER, 1898.

In re REAL ESTATE LOAN CO. OF CANADA v. GUARDHOUSE.

Prohibition—Division Court—Jurisdiction—Cause of action—Principal and interest due on mortgage—Splitting demand—Assignee of covenant—R. S. O. c. 60, s. 79.

An action was brought in a Division Court by the assignees of a covenant of a mesne owner of property, subject to a mortgage, for one of several gales of overdue interest, the principal also being overdue. On a motion for prohibition:—

Held, that while under s.-s. 2 of s. 79 of R. S. O. c. 60 a plaintiff may sue separately for principal and interest due, he must sue for the whole principal or interest, and not portions of either.

Held, also, that the claim of the primary creditors against the primary debtor being as assignees of a covenant, their claim was not for interest due on a mortgage, and that the section did not apply.

Order of ROBERTSON, J., in Chambers, reversed.

Stonehouse, for the primary debtor.

H. W. Mickle, for the primary creditors.

[ARMOUR, C.J. FALCONBRIDGE, J., STREET, J., 12TH SEPTEMBER, 1898.

CREIGHTON v. SWEETLAND.

Security for costs—Sheriff—Public duty—R. S. O. c. 89, s. 1.

A sheriff executing a writ of *fi. fa.* is not an officer or person fulfilling a public duty within the meaning of R. S. O. c. 89, s. 1, and is not, therefore, entitled to security for costs of an action brought against him for negligence in not making a seizure under the writ.

McWhirter v. *Corbett*, 4 C. P. 203, followed.

Biggs, Q.C., for the plaintiff.

H. M. Mowat, for the defendant.

[Leave to appeal refused by the Court of Appeal, 19th September, 1898.]

In re GUINANE.

Bankruptcy and insolvency—Assignment for benefit of creditors—Examination of clerk or servant of insolvent—R. S. O. c. 147, s. 34—Servant of firm of which insolvent a member.

An appeal by the assignee of the estate of W. J. Guinane, an insolvent trader, from an order of MEREDITH, C.J., in Chambers, dismissing a motion to commit one Keenan for refusing to answer questions upon the return of an appointment for his examination as a clerk or servant of the insolvent under s. 34 of the Assignments Act, R. S. O. c. 147. The question was whether Keenan was a servant of the insolvent, he having been a servant of the partnership firm known as the Guinane Shoe Company, of which W. J. Guinane was a member, that firm having been dissolved before the assignment, and Keenan not having been a servant of W. J. Guinane while he carried on business alone.

Held, that Keenan was examinable; and appeal allowed without costs.

Rex v. *Leech*, 3 Stark. 70, referred to.

Clute, Q.C., for the appellant.

Boland, for Keenan.

[FERGUSON, J., 6TH SEPTEMBER, 1898.

SUTHERLAND-INNES CO. v. TOWNSHIP OF ROMNEY.

Municipal corporations—Drainage by-laws—Registration—R. S. O. c. 223, s. 396 (1).

Held, that the provisions of 55 V. c. 42, s. 351, as amended by 60 V. c. 45, s. 7, s.-s. 1, and s. 47, R. S. O. c. 223, s. 396 (1), with reference to registration of by-laws creating debts, apply to drainage by-laws.

Semble, also, that a by-law so registered, and not attacked, and the certificate registered within the time prescribed, is valid and binding, even though one which the municipality had not power to pass.

Atkinson, Q.C. and *G. B. Douglas*, for the plaintiffs.

Aylesworth, Q.C. and *Rankin*, for the defendants.

[ROSE, J. 6TH MAY, 1896.

RENNIE v. FRAME.

Limitation of actions—Exclusive possession of land—Receipt of profits—Pasture for cattle.

While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant.

Held, that the produce of the land which the cattle ate was "profits" which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the cattle were upon the land the defendant was not in exclusive possession, and the Statute of Limitations did not begin to run in his favour.

Aylesworth, Q.C., and *William Millar*, for the plaintiff.

E. P. Clement, for the defendant.

[23RD JULY, 1898.

BICKNELL v. GRAND TRUNK R. W. CO.

Railway company—Negligence—Liability—Injury to person carried free—Contract as to connecting line—Exoneration.

An action by a cattle dealer to recover $30,000 damages

for injuries received by him while travelling on a freight train from Napanee to Montreal, by reason of a collision. The defendants admitted that the plaintiff was rightfully where he was at the time of the accident, and that the injury to him was caused by negligence of their servants; but alleged that the plaintiff was being carried in pursuance of the terms of his contract with the Bay of Quinte Railway and Navigation Company, and that the defendants were entitled to the benefit of such terms, and were exonerated from liability. The contract between the plaintiff and the Bay of Quinte Company was for the carriage of twenty-three head of cattle from Erinsville station on the Bay of Quinte line to Montreal—the greater part of the transit being by the defendants' line. The plaintiff accompanied the cattle for the purpose of superintending their loading and unloading and conveyance. By the 17th clause of the agreement between the plaintiff and the Bay of Quinte Company, it was provided that "when free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury, or detention of any person or persons travelling upon any such free passes, and whether such free passes are used in travelling on any regular passenger train or on any other train whatsoever; the person using any such pass takes all risks of every kind, no matter how caused."

Held, that this clause was by its terms expressly confined to the agreement between the plaintiff and the company.

Grand Trunk R. W. Co. v. *McMillan*, 16 S. C. R. 543, followed.

Hall v. *North Eastern R. W. Co.*, L. R. 10 Q. B. 437, distinguished.

Nor, upon the evidence, did the plaintiff authorize the Bay of Quinte Company to make any arrangement with the defendants which would free them from liability. It was not necessary for the plaintiff to prove a contract; the onus was on the defendants to prove exoneration.

Judgment for the plaintiff for $5,000, the amount found by the jury, with costs of action.

Aylesworth, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

[MEREDITH, J., 2ND AUGUST, 1898.

McINTYRE v. SILCOX.

Life insurance—Benefit of children—Alteration of apportionment, by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and re-issue of policies.

A parent insured his life for the benefit of six of his children, three of whom died without issue in his lifetime. He then made his will, by which he altered the shares of the three survivors, gave a portion to another child, and portions to four grandchildren, caused the policies to be cancelled and new ones issued payable to "his executors in trust," and died in 1894.

Held, that the apportionment or gifts to the four children were valid, but those to the grandchildren, while valid as legacies, were not valid as against the rights of creditors.

Held, also, that the application of the provisions of 60 V. c. 36, s. 159, "to any contract of insurance heretofore issued and declaration heretofore made" could not apply to any concluded transaction, but should be limited to those existing at the time of the death of the insured.

Held, also, that the issue of the new policies did not affect the rights of the parties, as the executors would take in trust for those who were beneficially entitled.

Videan v. *Westover*, 29 O. R. 1, distinguished.

W. A. Wilson, for the plaintiff.

T. W. Crothers, for the executors.

J. A. Robinson, for the defendant L. Clark.

D. B. S. Crothers, for the other adult defendants.

J. S. Robertson, for the infant defendants.

IN CHAMBERS.

[ARMOUR, C.J., 12TH SEPTEMBER, 1898.

REGINA v. GIBSON.

Police magistrate—Summary trial before—Court of Record—R.S.O. c. 83—Habeas corpus.

The defendant was charged before the police magistrate for the city of Hamilton with the offence of procuring females for immoral purposes, an offence triable at the General Sessions of the Peace, but elected to be tried summarily, and was tried by the magistrate, and by him convicted and sentenced to imprisonment and fine.

An application for a *habeas corpus* was made under R. S. O. c. 83, which provides for the issue of such a writ where a person is confined or restrained of his liberty, except persons imprisoned for debt or by process in any action or by the judgment, conviction, or order of a Court of Record, Court of Oyer and Terminer, or General Gaol Delivery, or Court of General Sessions of the Peace.

Held, that the words "a Court of Record" are intended to include only Superior Courts or principal Courts of Record, and do not include any Courts of Record inferior to or less principal than the High Court of Justice: *Gregory's Case*, 6 Co. Rep. 20 *b*; *O'Reilly* v. *Allen*, 11 U. C. R. 526.

If all Courts of Record had been intended, there would have been no necessity for adding "Court of Oyer and Terminer," etc., for these were all Courts of Record.

Regina v. *St. Denis*, 8 P. R. 16, and *Regina* v. *Goodman*, 2 O. R. 468, not followed, the liberty of the subject being involved.

J. Dickson, for the defendant.

[ROSE, J., 1ST AUGUST, 1898.

In re REGINA v. THE T. EATON CO., LIMITED.

Prohibition—Police magistrate—Charge against a corporation—Crimina Code, s. 448—Preliminary inquiry—Indictment.

Section 448 of the Criminal Code provides that certain acts constitute an "indictable offence."

Held, that the only way in which an offender can be prosecuted for violation of this section is by indictment. A prohibition was, therefore, awarded against a police magistrate who was holding a preliminary investigation.

Semble, that the only way in which a corporation can be prosecuted is by indictment.

Starcy v. *Chilworth Gunpowder Mfg. Co.,* 17 Cox C. C. 55, referred to.

J. J. Maclaren, Q.C., for the defendants.

Cavell, for the informant.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 27TH SEPTEMBER, 1898.

HUTCHINSON v. COLBY.

Appeal—Acting on order appealed against—Abandonment of order—Amount in dispute—Forum—Attachment.

The plaintiff sued to recover $70.70, and issued a writ of attachment. The defendant took out a summons to set aside the writ of attachment, which summons was discharged by the County Court Judge on the 23rd July, 1898. No order was then taken out, and the case went to trial, when judgment was entered for the plaintiff for $47.70. This, however, was set aside and a new trial granted, when judgment was entered for the plaintiff for $65.70.

The defendant before the second trial took out an order dismissing the application to set aside the writ of attachment, and appealed therefrom to the full Court, when the plaintiff moved before a Judge to strike out the appeal, contending that the defendant was estopped from appealing by reason of her proceeding with the trial of an action after the order discharging the summons was made, by calling and examining witnesses, and by applying for a new trial after the order had been made; that the defendant had acted on

the order and could not appeal from it; that he had abandoned the order by neglecting to serve it upon the plaintiff or his solicitor within a reasonable time; that at the time the defendant commenced her proceedings in appeal the amount in question did not exceed $50, and the appeal should have been to a single Judge.

Held, that the defendant had not acted on the order. She was throughout defending herself against the whole proceeding. The Judge's decision was against her contention that the attachment should not have issued. The time for the trial had been fixed before the application to set aside the attachment was disposed of, but even if it had not, and if the defendant had sought afterward to speed the trial in order to get rid of the attachment, it should not be considered that she was acting upon the order dismissing her application. It could not be said that she abandoned the order by not serving it. The order was against her, and she could not abandon it.

As to whether the appeal should have been to the full Court or a single Judge, so far as there could be said to have been an amount in question on the application to set aside the attachment, it was more than $50 when that application was pending, and it did not appear that this was altered by a judgment for a less amount which had been set aside when the appeal was entered.

Leech, for the plaintiff.

Bonnar, for the defendant.

TAYLOR v. CITY OF WINNIPEG.

Municipal corporations—Negligence—Ice on sidewalk—Reasonableness of obstruction or danger—Question of fact.

Action by husband and wife against the corporation of the city of Winnipeg to recover damages for injuries sustained by the wife through falling upon a sidewalk.

A well had been constructed by the city at the corner of two streets and a pump placed in it to enable citizens to obtain water therefrom.

The well was very generally used by the public, with the result that water was spilled upon the ground in its vicinity, both directly from the pump and from pails in which it was carried away, or in pouring it from pails into tubs and barrels. Some of this water thus spilled was frozen upon the sidewalk close to the pump, where the wife fell and broke her leg.

For the defence it appeared that different servants of the city corporation were constantly passing the spot, and that several of them were there on the very day of the accident and did not consider it necessary to do anything for the purpose of making the place more safe for foot passengers.

There was no doubt that the walk at the pump and at the scene of the accident was not very safe for travel, but it did not appear that it was more unsafe than many other spots in the sidewalks of the city were frequently rendered by local conditions when freezing and thawing follow each other at short intervals.

Even when water was spilled through negligence, the city corporation could not be considered as a joint tort-feasor with the person guilty of negligence or otherwise responsible for the result.

Given the existence of the obstruction or danger, it usually becomes a question of fact whether, in view of all the circumstances, including the position of the locality, its surroundings, the climatic conditions, the causes, nature, extent, or number of such obstructions or dangerous places, and the difficulty or expense of remedying them, it is reasonable to hold that the municipality should have removed or otherwise corrected them. Their mere existence is not sufficient of itself. There should be something in the circumstances to warrant the Court in leaving the question of reasonableness to the jury.

In the present case the question was one of fact, and the evidence did not warrant finding the city corporation liable. Action dismissed with costs.

Haggart, Q.C., for the plaintiffs.

Ewart, Q.C., and *I. Campbell*, Q.C., for the defendants.

Supreme Court of Canada.

AWARD OF ARBITRATORS.] [14TH JUNE, 1898.

PROVINCES OF ONTARIO AND QUEBEC v. DOMINION OF CANADA.

In re COMMON SCHOOL FUND AND LANDS.

Constitutional law—B. N. A. Act, s. 142—Award of 1870, validity of—Upper Canada improvement fund—School fund—B. N. A. Act, s. 109—Trust created by—Effect of Confederation on.

The arbitrators appointed in 1870, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, representing the former Province of Canada. In dealing with the common school fund established under 12 V. c. 20, they directed the principal of the fund to be retained by the Dominion and the income therefrom to be paid to the Provinces.

Held, that, even if there was no ultimate "division and adjustment" such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore *intra vires* of the arbitrators.

Held, further, that there was a division of the beneficial interest in the fund and a fair adjustment of the rights of the Provinces in it, which was a proper exercise of the authority of the arbitrators under the statute.

By 12 V. c. 200, s. 3, one million acres of the public lands of the Province of Canada were to be set apart to be sold and the proceeds applied to the creation of the "common school fund" provided for in s. 1. The lands so set apart were all in the present Province of Ontario.

Held, that the trust in these lands created by the Act for the common schools of Canada did not cease to exist at Confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the common schools of the new Provinces of Ontario and Quebec.

In the agreement of reference to the arbitrators appointed under Acts passed in 1891, to adjust the said accounts, questions respecting the Upper Canada improvement fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two Provinces up to January, 1889.

Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the schools lands, the amount of which was one of the items in the accounts rendered.

E. Blake, Q.C., *Æmilius Irving*, Q.C., and *J. M. Clark*, for the Province of Ontario.

Trenholme, Q.C., *Beique*, Q.C., and *Hall*, Q.C., for the Province of Quebec.

Hogg, Q.C., for the Dominion of Canada.

QUEBEC.] [6TH OCTOBER, 1898.

CITIZENS' LIGHT AND POWER CO. v. LEPITRE.

Negligence—Insulation of electric wires—Cause of death.

The deceased was employed as a lineman by the company, and at the time of the accident was at his work, passing a wire along the ceiling of the cellar of the power house, in close proximity to a large number of wires charged with a strong electric current. There was some evidence to show a possibility of imperfect insulation of the live wires, as the ends of the tie-wires, by which they were attached to porcelain insulating knobs, were left bare, instead of being covered with insulating tapes. The witnesses declared that it was not usual to cover the ends of tie-wires in this manner, but that, if such precautions had been taken, the possibility of

accident through coming in contact with live wires would have been decreased. The deceased was not seen to come in contact with the tie-wires, but was found dead on the floor, where he had been working, with a wound on his arm as from a burn, and one of his shoes burnt and broken in the sole. The trial Judge found that the cause of the injury might reasonably be attributed to the tie-wires being left uncovered, and rendered a verdict against the company on the ground that the presumption of fault had not been rebutted and it had not been shown that the deceased had been guilty of any imprudence which might have caused him to receive an electric shock.

Held, affirming the judgment of the Court below, that there was sufficient evidence to sustain the findings of the trial Judge, as it appeared that an obvious precaution for the prevention of accidents by live wires had been neglected by the company, whose duty it was to take the utmost care for the prevention of injury being caused by the dangerous material with which they were dealing.

Allan, for the appellants.

Desmarais and *Belcourt*, for the respondent.

[10TH OCTOBER, 1898.

SIMPSON v. PALLISER.

Appeal—Jurisdiction—Court of Review.

The Superior Court rendered judgment in favour of the plaintiff, and both parties appealed against this judgment to the Superior Court, in Review, at Montreal. The Court of Review found error in the judgment of the Superior Court, and, proceeding to render the judgment which should have been rendered in that Court, increased the amount of damages awarded at the trial, the appeal by the plaintiff being thus successful to a certain extent, and the defendants' appeal being wholly unsuccessful. By the Supreme and Exchequer Courts Act, as amended by 54 & 55 V. c. 25, s. 3, appeals are allowed from the Court of Review direct to the Supreme

Court of Canada only "in cases where and so long as no appeal lies from the judgment of that Court when it confirms the judgment rendered in the Court appealed from," as provided by C. P. Q. Art. 43, par. 4.

Held, that the judgment rendered in the first instance had not been confirmed, and that, under the circumstances, there could be no direct appeal to the Supreme Court of Canada from the judgment of the Superior Court in Review.

The appeal was quashed without costs.

Atwater, Q.C., and *R. Greenshields*, for the appellant.

C. H. Stephens, Q.C., for the respondents.

[12TH OCTOBER, 1898.

TOWN OF CHICOUTIMI v. PRICE.

Municipal corporations—By-law—Approval by ratepayers—Majority in number and value.

The provisions of Art. 4529 of the Revised Statutes of Quebec require that loans by town corporations should be made only under by-laws of the council approved by the majority in number and in value of the electors in the municipality who are proprietors of real estate therein, the number to be ascertained by the polling, and the majority in value of the real estate to be computed by reference to the municipal rolls.

Geoffrion, Q.C., and *Belleau*, Q.C., for the appellants.

Languedoc, Q.C., and *Stuart*, Q.C., for the respondent.

[13TH OCTOBER, 1898.

VIAU v. THE QUEEN.

Appeal—Jurisdiction—Criminal law—New trial—Criminal Code, 1892, ss. 742-750—"Opinion."

An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of

Appeal under the provisions of the Criminal Code, 1892, ss. 742 to 750, inclusive.

The word "opinion," as used in s.-s. 2 of s. 742 of the Criminal Code, 1892, must be construed as meaning a decision or judgment of the Court of Appeal in criminal cases.

Cannon, Q.C., for the Crown.

Poirier, for the prisoner.

NEW BRUNSWICK.] [14TH JUNE, 1898.

SMITH v. ST. JOHN CITY R. W. CO.

CONSOLIDATED ELECTRIC CO. v. ATLANTIC TRUST CO.

CONSOLIDATED ELECTRIC CO. v. PRATT.

Appeal for costs—Consolidation of suits—Discretion of Court appealed from.

On the hearing of a suit in equity before Palmer, J., late Judge in Equity for New Brunswick, he directed the consolidation of such suit with two others involving similar issues. No order for consolidation was taken out, and separate interlocutory decrees were afterwards issued in the three suits. The hearing subsequently proceeded before another Judge, who held that the suits had been consolidated, and directed the costs to be taxed on that basis. The Supreme Court of New Brunswick having affirmed this order, an appeal was taken to this Court.

Held, that it is only when some fundamental principle of justice has been ignored, or some other gross error appears, that the Supreme Court will interfere with the discretion of Provincial Courts in awarding or withholding costs, and this was not a case of the kind.

Pugsley, Q.C., for the appellants.

W. Cassels, Q.C., *Stockton*, Q.C., and *Tilley*, for the several respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ROSE, J.] [4TH OCTOBER, 1898.

HANNUM v. McRAE.

Contempt of Court—Witness—Local manager of bank—Production of bank books—Disclosure of bank accounts—Inconvenience—Privilege—Motion to commit—Service of papers.

The local manager of a chartered bank was subpœnaed to attend as a witness before a Master upon a reference in an action to which neither he nor the bank was a party, and there to produce the books of the bank and give evidence. The testimony sought was relevant to the matters in question in the action, and no party thereto objected to its being adduced, nor to the means by which it was sought to be obtained.

Upon appeal from an order, made upon a motion to commit the witness for his contempt in refusing to produce the books or give evidence of their contents, requiring him to attend at his own expense and do so:—

Held, that inconvenience to the bank was no ground for refusing to produce the books.

Unless exempted by legislation, a banker is not excused from producing his books or testifying as to his customer's balance, when relevant to the issue.

Discussion of the English Bankers' Books Evidence Act, 1879.

Prima facie the custody and control of the books of the branch of which he was manager fell within the scope of the witness' duty, and it was incumbent upon him to make it clear that he was expressly forbidden to produce them.

If a subpœna *duces tecum* is served upon an officer who has the absolute control and the ability to produce, he must do so.

In re Dwight and Macklam, 15 O. R. 148, approved and followed.

Evidence as to a customer's account is not privileged at common law, and s. 46 of the Bank Act is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts save by a director.

Even if the prohibition of the directors would justify non-production, it would not protect the witness from speaking to facts within his knowledge.

Where a motion to commit is made, it is not, in this Province, necessary to serve with the notice of motion copies of the affidavits on which it is based.

Decision of ROSE, J., 17 P. R. 567, 17 Occ. N. 403, affirmed.

Travers Lewis, for the appellant.

Watson, Q.C., and *F. R. Latchford*, for the respondent.

HIGH COURT OF JUSTICE.

[FERGUSON, ROBERTSON, MEREDITH, JJ., 8TH SEPTEMBER, 1898.

In re LEAK AND CITY OF TORONTO.

Municipal corporations—Arbitration and award—Lands injuriously affected—Interest.

Interest may be allowed by an arbitrator on the amount of compensation awarded to a land-owner against a municipality for injuriously affecting his lands in the exercise of its powers.

Per ROBERTSON, J.—The act causing injury is not tortious or illegal, and *compensation* is not to be treated as damages.

Per MEREDITH, J.—The municipality is not a wrong-doer, and, therefore, it is not a case of assessing damages for a wrong done.

Per FERGUSON, J., dissenting.—Interest should not be allowed upon mere unascertained damages; and damages in respect of lands "injuriously affected" are damages of that character.

In re McPherson and City of Toronto, 26 O. R. 558, 15 Occ. N. 221, discussed.

Decision of STREET, J., 17 Occ. N. 191, reversed; FERGUSON, J., dissenting.

W. H. P. Clement, for the appellant.

Fullerton, Q.C., and *W. C. Chisholm*, for the city corporation.

[BOYD, C., ROBERTSON, J., 4TH OCTOBER, 1898

MAGANN v. FERGUSON.

Money in Court—Payment in with defence—Election to take out—Time—Extension—Judgment—Rules 353, 419, 424.

A defendant brought money into Court with his defence, under Rule 419, in full satisfaction of one of the alleged causes of action. The plaintiff did not elect to take the money out of Court within the time limited by Rule 424, and judgment was given in favour of the defendant upon the cause of action in respect of which the money was paid in. The judgment did not dispose of the money in Court.

Held, that it remained in Court subject to the final order of the Court after the determination of the action, and must be disposed of in accordance with such determination. The plaintiff, not having elected to take the money out within the proper time, was not entitled, after judgment, to have the time extended by an order *nunc pro tunc* under Rule 353.

J. T. C. Thompson, for the plaintiff.

Rowell, for the defendant.

[5TH OCTOBER, 1898.

ARTHUR & CO. (LTD.) v. RUNIANS.

Discovery—Production of documents—Application before statement of claim—Pleading—False representations.

Production of documents should not be ordered to a plaintiff before he pleads, unless the Judge is satisfied that the documents called for are essential to the statement of the plaintiff's claim.

In an action for damages for false representations made by the defendants whereby the plaintiffs were induced to supply them with goods and money and to enter into agreements with them to the plaintiffs' loss:—

Held, that it was enough for the plaintiffs to aver in their statement of claim that the goods and money were supplied on the faith of statements, oral and written—specifying them—falsely and fraudulently made; and this they could do without the production of the defendants' balance sheets, books of account, etc. If particulars were afterwards claimed, it would then be time enough to apply for discovery.

F. E. Hodgins, for the plaintiffs.

Swabey, for the defendants.

[8TH OCTOBER, 1898.

DAWSON v. LONDON STREET R. W. CO.

Discovery—Examination of officers of street railway company—Conductor and motorman.

In an action for damages for bodily injuries sustained by a pedestrian, as alleged, by reason of the negligent management and operation of a car of the defendants, an incorporated company:—

Held, that the conductor and motorman of the car were officers of the company examinable for discovery; but, as the plaintiff had already examined the general manager, he

should, under Rule 439 (2), not be allowed to examine both the conductor and motorman, but only one of them.

W. J. Harvey, for the plaintiff.

Hellmuth, for the defendants.

[FALCONBRIDGE, J., STREET, J., 8TH OCTOBER, 1898.

LAZIER v. HENDERSON.

Landlord and tenant—Assignment for benefit of creditors—Future rent—Preferential lien—Distress—R. S. O. c. 170, s. 34.

By the terms of a lease of shop premises, the rent was payable quarterly in advance. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors. There was a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable, and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable.

Semble, that the latter part of the proviso was in fraud of creditors and void.

Held, that the expression "arrears of rent due . . . for three months following the execution of such assignment" in s. 34 of the Landlord and Tenant's Act, R. S. O. c. 170, means "arrears of rent becoming due during the three months following the execution of such assignment"; and the landlord was, therefore, apart from the proviso, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment.

Held, also, that the expression "the preferential lien of the landlord for rent" in s. 34 has the same meaning that it had under the Insolvent Act; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the

premises at the date of the assignment which were subject to distress, although there was no actual distress.

E. G. Porter, for the plaintiff.

V. J. Hughes, for the defendant.

[ROSE, J., MACMAHON, J., 10TH OCTOBER, 1898.

SMYTHE v. MARTIN.

Pleading—Statement of claim—Extension of claim made in writ of summons —Rule 244.

An appeal by the defendants from an order of ARMOUR, C.J., in Chambers, reversing an order of one of the local Judges at Windsor whereby part of the statement of claim was struck out, and restoring such part.

The writ of summons was indorsed with a claim for an injunction to restrain waste. The statement of claim went further and claimed to recover possession of the land in respect of which the injunction was sought.

Held, that what was claimed by the pleading was an "extension" of what was claimed by the writ, within the meaning of Rule 244.

United Telephone Co. v. *Tasker,* 59 L. T. N. S. 852, and *Cave* v. *Crew,* 41 W. R. 359, 3 R. 401, distinguished.

Appeal dismissed with costs to the plaintiff in any event.

F. C. Cooke, for the defendants.

H. Cassels, for the plaintiff.

[BOYD, C., 20TH OCTOBER, 1898.

MERCER v. NEFF.

Executors and administrators—Will—Devise—Power to mortgage—Payment of debts—Trustee Act—Devolution of Estates Act.

The testatrix devised land to her executor and trustee, and his executors and administrators, upon trust to retain

for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children.

Held, that this was a devise of the farm out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns;" the executor had the right by virtue of s. 16 of the Trustee Act, R. S. O. c. 129, to mortgage for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19.

In re Bailey, 12 Ch. D. 273, and *In re Tanqueray*, 20 Ch. D. 478, followed.

The Devolution of Estates Act, R. S. O. c. 127, does not apply to a case where the executor acts under the will and the provisions of the Trustee Act.

J. R. Roaf, for the plaintiff.

W. H. Irving, for the defendant Richardson.

C. H. Porter, for the other adult defendants.

A. J. Boyd, for the infant defendants.

[MEREDITH, C.J., 22ND SEPTEMBER, 1898.

WARD v. CITY OF TORONTO.

Landlord and tenant—Covenant for renewal—Election—Compensation for improvements—Notice.

Where a covenant in a lease to the effect that if at the expiration of the term the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew at a rental to be fixed as therein directed; provided also that if the lessors did not see fit to renew, the lessee should receive compensation for his permanent improvements:—

Held, that, in order to get the benefit of this proviso, it was necessary that the defendants should make their election not to renew before the expiration of the term.

W. Nesbitt, for the plaintiff.

Fullerton, Q.C., for the defendants.

[17TH OCTOBER, 1898.

ECKHARDT v. LANCASHIRE INS. CO.

Fire insurance—Variation from statutory conditions—"Co-insurance" clause —"Not just and reasonable"—R. S. O. c. 203, s. 171.

The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for $15,000, "subject to seventy-five per cent. co-insurance,"—these last words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink among the variations of the statutory conditions, as follows: "The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of $42,120.71, the cash value of the property insured being $115,000, and the whole amount of insurance upon it, including the $15,000 named in the defendants' policy, $70,000. The defendants had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than the later; but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy.

Held, following *Wanless* v. *Lancashire Ins. Co.*, 23 A. R. 224, that the "co-insurance" clause was a condition and a variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of s. 171 of the Ontario Insurance Act, R. S. O. c. 203, it was binding on the insured.

W. Cassels, Q.C., and *A. W. Anglin*, for the plaintiffs

Osler, Q.C., and *C. S. MacInnes*, for the defendants.

[ARMOUR, C.J., 18TH OCTOBER, 1898.

In re HENDERSON AND CITY OF TORONTO.

Municipal corporations—By-law—Registration—Non-conformity with plan "Instrument"—Notice.

Motion by James Henderson to quash by-law 3519 of the corporation of the city of Toronto, being a by-law "to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Rosedale Valley road between Yonge street and the river Don, in ward No. 2, for the cost of opening the said street."

By-law 2164 provided for the opening of the Rosedale Valley road, and one of the grounds upon which it was sought to quash by-law 3519 was that by-law 2164 was never registered, and the road was therefore never validly opened, and no assessment could be made for its cost. By-law 2164 was passed on the 27th July, 1888, and the law then, as now, was that "every by-law passed since the 29th March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road, or highway has been or is opened upon any private property, shall, before the same becomes effectual in law, be duly registered:" R. S. O. 1887 c. 184, s. 547. A duplicate original of by-law 2164, certified under the hand of the clerk and the seal of the city corporation, was received at the proper registry office on the 22nd August, 1888, and a $2 fee for registry was then and there paid, but it was never registered or entered in any of the books of the registry office, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R. S. O. 1887 c. 114, s. 84, s.-s. 2.

Held, that this by-law came within the prohibition of the last-mentioned enactment, for the reason assigned by the registrar, and also because the by-law was an "instrument" within the meaning of that section, and as defined by s. 2 of the Act. Section 96 of R S. O. 1897 c. 136 must be read with s. 100 of the same Act, and so reading it, the effect of s. 100 is not diminished, for this by-law was not, under the

circumstances, capable of registration. And the by-law, never having been registered, never became effectual in law for any purpose. The provision for the registration of such a by-law did not at first appear in any registry Act, but in a municipal Act, 29 & 30 V. c. 51, s. 348, and it is not to be qualified by holding that the registration is only required for the purpose of notice under the registry laws. And this by-law, never having become effectual in law, never had any force or validity whatever, and nothing done under it could be justified by it; and therefore by-law No. 3519 had no foundation and must be quashed.

F. E. Hodgins, for the motion.

Fullerton, Q.C., and *Caswell*, for the city corporation.

IN CHAMBERS.

[ARMOUR, C.J., 11TH OCTOBER, 1898.

In re YOUNG.

Infants—Custody—Paternal right—Maternal right—Separation of family.

Application by Andrew Young, upon the return of a writ of *habeas corpus* addressed to Maggie Young, his wife, and William Taylor, her father, for an order for the delivery of the applicant's seven children, the eldest of whom was fifteen years old, to him, and upon the petition of Maggie Young, their mother, for an order awarding her the custody of such children.

Held, on the evidence, that the father was guilty of adultery with a woman, a servant in his own house, and was also guilty of making loose and unfounded insinuations against his wife's chastity, and of using foul and indecent language to her and their children, and of being harsh and unkind and at times cruel to her and them.

Held, that the provisions of R. S. O. 168 recognize the maternal right, as well as the paternal right, and require equal regard to be paid to the wishes of the mother as to

those of the father, differing from the English statute in this respect, and rendering the decisions thereunder to some extent inapplicable here. The result of this is that where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare of the children. It certainly could not be for the welfare of such of the children as were under five years that they should be removed from the custody of their mother; and that being so, it was impossible to give the custody of any of the children to the father, for it is wrong to separate the children: *Warde* v. *Warde* 2 Ph. 786; *Re Elderton*, 25 Ch. D. 220; *Smart* v. *Smart*, [1892] A. C. 425.

Order made that the mother should retain the custody of the children, and that the father should have access to them at such times as might be agreed upon, or, in case of failure to agree, at such times as should be fixed by the Chief Justice. Costs to be paid by the father.

L. F. Heyd, for the father.

J. H. Moss, for the mother and maternal grandfather.

[Rose, J., 6th October, 1898.

REGINA v. GIBSON.

Criminal law—Procuring female for prostitution—Commitment—Recital of invalid conviction—Duplicity—Criminal Code, ss. 185, 800.

A commitment of the defendant to gaol recited a conviction for "unlawfully procuring or attempting to procure a girl of seventeen years to become, without Canada, a common prostitute, or with intent that she might become an inmate of a brothel elsewhere."

Held, that the commitment was bad on its face, as it recited a conviction which was invalid for duplicity and uncertainty.

The commitment alleged a conviction, and might have been supported under s. 800 of the Criminal Code, if there was a good and valid conviction to sustain it.

The conviction returned was that the prisoner, at H., etc., did unlawfully procure a girl of seventeen years, I. D., to become, without Canada, an inmate of a brothel, to wit, a brothel kept by the prisoner at L., in the State of New York, one of the United States of America.

Held, not a good and valid conviction, because it did not come within any of the provisions of s. 185 of the Code.

Wallace Nesbitt, for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

[ROBERTSON, J., 7TH OCTOBER, 1898.

REGINA v. PONTON.

Venue—Change of—Criminal cause—Fair trial—Evidence as to.

Upon a motion made by the Crown, under s. 651 of the Criminal Code, to change the venue for the trial of three persons charged with the offence of breaking a bank in the town of Napanee and stealing money therefrom, from the town of Napanee to some other place, upon the ground that the sympathy felt for two of the accused in the town and in the county of Lennox and Addington, of which it is the county town, was such that a fair trial could not be had:—

Held, that the rule that all causes should be tried in the county where the crime is supposed to have been committed ought never to be infringed unless it plainly appears that a fair and impartial trial cannot be had in that county; and mere apprehension, belief, and opinion are not to be relied on as evidence.

And, under the circumstances appearing upon affidavits filed, the motion was refused.

L. G. McCarthy, for the Crown.

Wallace Nesbitt, for the defendant Ponton.

C. J. Holman, for the defendant Mackie.

W. E. Middleton, for the defendant Holden.

NEW BRUNSWICK.

In the Supreme Court.

IN CHAMBERS.

[McLeod, J., 10th October, 1898.

FRIGEAN v. COLLET.

Pleading—Signing plea—Attorney—Counsel—Irregularity—Leave to amend—Interlocutory judgment—Setting aside.

This was an action against husband and wife for slander alleged to have been uttered by the wife. The defendants' attorney, within the time allowed in which to plead, pleaded; but signed the plea as "attorney for the defendant" and not as "of counsel for the defendant."

The plaintiff's attorney served a joinder of issue, but did not file it. He afterwards treated the joinder and plea as nullities, signed interlocutory judgment, and issued writ of inquiry for assessment of damages.

The defendants applied for an order to set aside interlocutory judgment, and for leave to amend the plea.

Held, that English cases cannot be strictly followed on the question of signing pleas, as the positions of counsel and attorney in England are very different from what they are in this country. Signing plea as "attorney" instead of as "of counsel" is an irregularity and not a nullity.

It was ordered that interlocutory judgment be set aside and that defendants have leave to amend their plea.

W. D. Carter, for the plaintiff.

R. H. Davis, for the defendants.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 22ND SEPTEMBER, 1898.

FLOUR CITY BANK v. CONNERY.

Summary judgment—Promissory note—Escrow—Leave to defend.

Application for summary judgment in an action on a promissory note by the indorsee against the maker.

The defence set up was that the note was handed by the maker to one Lawrie to hold in escrow until the settlement of certain accounts between the maker and March Brothers, and that it was delivered over to the payee without the consent of the maker.

Held, that the application should be dismissed with costs.

Without entering into the question whether the handing over of the note to the payee and the subsequent indorsement constituted a fraud within s. 30, s.-s. 2, of the Bills of Exchange Act, 1890, as Lawrie was an agent of March Brothers, who were the agents of the payee, and as the defendant could not be expected to have personal knowledge of the circumstances under which the note was handed over, he should not be precluded from defending.

Hull, for the plaintiff.

Dawson, for the defendant.

[3RD OCTOBER, 1898.

MERCHANTS' BANK v. McKENZIE.

Fraudulent conveyance—Attack by judgment creditor—Proof of consideration paid by alleged purchaser—Onus—Statute of Limitations—Concealed fraud.

This action was brought to have it declared that certain lands held by the defendant McKenzie, for which she had

certificates of title, were held by her as trustee for the defendant McLean, or were transferred to her in fraud of his creditors, and the plaintiffs sought to enforce against these lands a judgment recovered by them against McLean.

In 1884, while he held these lands, McLean got into financial difficulties and became insolvent. At that time the plaintiffs were creditors of McLean, and in 1894 they recovered against him a judgment upon paper given in renewal of and representing indebtedness of 1884. The taxes upon these lands having fallen in arrear, they were offered for sale by the municipal authorities and purchased by certain persons; before the time for redemption had expired, these persons assigned their tax sale certificates to the defendant McKenzie, and deeds were issued to her, upon which she obtained certificates of title under the Real Property Act.

The purchase of the lands was proposed by McLean, and the negotiations conducted by his solicitor, on behalf of the defendant McKenzie. The money used to pay for the purchase was produced by McLean, though obtained, as the defendants stated, from the defendant McKenzie. She was niece and housekeeper to McLean, and he was to have paid her $10 a month for her services, but he had never paid any portion of the amount. The cost of the purchase of the two parcels was about $250, of which the defendant McKenzie admittedly supplied not more than half. It was asserted that McLean was indebted to her in a large sum for wages, and that this debt was in some way a consideration which would support her title or rebut any presumption of a voluntary or fraudulent transfer or of a trusteeship. No evidence of any agreement upon this basis was given at the trial.

Held, that there must be judgment declaring that the plaintiffs were entitled to a lien or charge upon the lands for the amount of their judgment and interest and the costs of the action, and for a sale of the property. The onus was strongly thrown upon the defendant McKenzie to account for her possession of the money she said she had advanced in the purchases, and for the source from which the balance of the purchase moneys was derived. In the absence of

satisfactory evidence upon these points, the Court should treat the purchase as made by McLean and with his money. There was no evidence on which to find that the alleged claim for wages was in reality considered as a ground or consideration for the transaction. There was no consideration from the defendant McKenzie to McLean for the purchase of the property for her, and it was unimportant whether the case was to be considered as one of a voluntary settlement upon her, or of a trust in McLean's favour.

Where the full consideration is furnished by the debtor, the purchased property should be considered his as between the voluntary grantee and the creditors.

If it was to be considered that otherwise the action was not brought within ten years next after the right to bring it accrued, the case should be treated as one of concealed fraud; the fraud was not discovered, and could not, by the exercise of reasonable diligence, have been discovered more than ten years before the commencement of the action.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Ewart, Q.C., and *McPherson*, for the defendants.

[BAIN, J., 7TH OCTOBER, 1898.

LOPPKY v. HOFLEY.

Prohibition—County Court—Amount in controversy—Settled account—Jurisdiction dependent on contested facts.

Application for prohibition. The defendant, in 1894, made a contract for an addition to a building he owned, the lumber for which was to be ordered from the plaintiff. An order for lumber to the amount of $615 was placed with the plaintiff; afterwards the plan of the building was changed and an order given to the plaintiff for extra lumber. Payments were made on account of the $615 order, some of which were made after the second order was given. In 1898 the plaintiff sued the defendant in a County Court on an itemized bill for lumber, amounting to about $126. The defendant put in a plea of never indebted. At the trial, on

the cross-examination of the plaintiff, the order for $615 was mentioned, and the defendant's counsel contended that the account sued on was a part of an unsettled account exceeding $600; that the two orders for lumber constituted a running account; and that some of the items charged in the account sued on were included in the $615 order. The County Court Judge held that the $615 order was a separate transaction, and had been settled, and that the account sued on was a separate account for the extra lumber, and had never been settled. After some evidence had been given the trial was adjourned. Before judgment was given the defendant moved for prohibition.

Held, that the motion should be dismissed with costs. It was competent and necessary for the Judge to inquire into and decide the facts which would determine the question of jurisdiction; the Court should not, in this case, review the decision of the County Court Judge. Where the question of jurisdiction depends on contested facts, which the Judge of the inferior Court is competent to inquire into and determine, his decision on these facts is taken as conclusive, unless in very exceptional circumstances: *Joseph* v. *Henry*, 19 L. J. Q. B. 369; *Elston* v. *Rose*, L. R. 4 Q. B. 4.

Wilson, for the plaintiff.

McKerchar, for the defendant.

[15TH OCTOBER, 1898.

CITY OF WINNIPEG v. CANADIAN PACIFIC R. W. CO.

Assessment and taxes—By-law to exempt from municipal taxes—Liability for school taxes—Right of municipality to sue.

The plaintiffs sued, previous to the Queen's Bench Act, 1895, to recover arrears of school taxes for the years 1890 to 1894. The defendants pleaded, among other matters, that the land was not liable to be assessed, rated, or taxed, having been legally exempted therefrom by a by-law of the plaintiffs. This by-law the plaintiffs in their replication set out in full. One provision of it was that all property owned by the defendants within the city of Winnipeg for railway purposes,

or in connection therewith, should be "forever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind." The defendants demurred to the replication.

The main question was whether school taxes came within the exemption from "all municipal taxes," etc.

Held, that judgment should be entered for the plaintiffs on the demurrer. The by-law being one of a municipal corporation, the inference would be that it was municipal taxation that was referred to. The words "rates and levies and assessments," as used in the by-law, mean just the same thing as "taxes," with which they are collocated. The word "municipal" in the enacting clause of the by-law was manifestly used in the sense of pertaining or belonging to a municipality. As the by-law was one of a municipality incorporated as a city, the words "municipal taxes," etc., meant no more than would be expressed if the words had been "city or corporation taxes," etc.

It was a matter of general knowledge that the municipal and school systems and corporations in the Province were and always had been separate and distinct organizations; there was a real and essential difference between school and municipal taxes. Before any municipality had been created in the Province, public schools had been established under the management of boards of school trustees, which boards had power to collect moneys for school purposes; subsequently the law was changed, and the school trustees made out an estimate of the amount required, which the city council collected with the corporation taxes.

The Assessment Act, R. S. M. c. 101, s. 135, as amended by 57 V. c. 24, s. 3, gave the plaintiffs the right to sue for the taxes in question.

Howell, Q.C., and *I. Campbell*, Q.C., for the plaintiffs.

Aikins, Q.C., and *Culver*, Q.C., for the defendants.

[20TH OCTOBER, 1898.

In re O'CONNOR, O'CONNOR v. FAHEY.

Administration order—Legacy unpaid—Sale of property—Discretion of executors.

The plaintiff, a legatee under the will of one O'Connor, applied for an order for the administration of the estate, under Rule 766.

The only ground that was advanced why such an order should be made was that over a year had elapsed since the death of the testator, and the legacy had not been paid. There were creditors' claims unpaid, which the executors had not money in hand to pay; the principal asset of the estate was hotel property, which the executors had not been able to sell. The legacy would have to come out of the proceeds of the hotel property. The testator left a direction that the executors were to sell as soon after the testator's death as they might deem proper and as soon as they could conveniently do so without sacrificing the estate.

Held, that the motion should be dismissed with costs.

There would be no advantage in having the estate administered by the Court. While the Court will enforce the due execution of a power coupled with a trust, it will not interfere with the discretion of trustees as to the particular time or manner of their *bona fide* exercise of it: *Tempest* v. *Camoys*, 21 Ch. D. 571; *Re Blake*, 29 Ch. D. 512.

Elliott, for the applicant.

Culver, Q.C., and *West*, for the executors.

Supreme Court of Canada.

ONTARIO.] [2ND NOVEMBER, 1898.

HYDE v. LINDSAY.

Statutes—60 & 61 V. c. 34—Limitation of right of appeal—Application to pending cases.

The Dominion statute 60 & 61 V. c. 34, which provides that in cases decided by the Ontario Courts no appeal will lie to the Supreme Court of Canada unless title to land or some interest therein is in question, or more than $1,000 is in controversy, or as in other cases specified, received the Royal assent on the 29th June, 1897. In this case the trial was concluded and judgment reserved on the 25th June, 1897. The case eventually went to the Court of Appeal, where judgment was pronounced in the spring of 1898, and an appeal was taken therefrom to the Supreme Court.

On an application to KING, J., in Chambers, to approve of the security for costs on such appeal, the respondent contended that the above statute prohibited the appeal, as the judgment appealed from gave the respondent less than $1,000. The learned Judge referred the matter to the Court.

Held, that the statute did not apply to the case, as the proceedings therein were pending when it came into force, although the judgment appealed from was not pronounced until afterwards.

Hurtubise v. *Desmarteau,* 19 S. C. R. 562; *Coulure* v. *Bouchard,* 21 S. C. R. 281; *Williams* v. *Irvine,* 22 S. C. R. 108; and *Cowen* v. *Evans, ib.* 331, followed.

Belcourt, for the motion.

Pratt, contra.

MANITOBA.] [13TH OCTOBER, 1898.

NORTH-WEST ELECTRIC CO. v. WALSH.

Company—Directors—By-law—Ultra vires—Discount shares—Calls for unpaid balances—Contributories.

The directors of a joint stock company incorporated in Manitoba have no power under the provisions of the Manitoba Joint Stock Companies Incorporation Act to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment, without the sanction of a general meeting of the shareholders of the company, is invalid.

A by-law or resolution of the directors of a joint stock company which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company.

Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.

Judgment of the Court of Queen's Bench for Manitoba, 11 Man. L. R. 629, reversed; TASCHEREAU, J., dissenting.

Ewart, Q.C., for the appellants.

J. S. Tupper, Q.C., for the respondent.

N. W. T.] [24TH OCTOBER, 1898.

HOLDEN v. HATFIELD.

Contract—Construction—Ownership of goods—Interpleader.

W., a merchant, owing money to H., who was pressing for a settlement, an agreement was entered into as follows: 1. W. and M., his wife, will, during the continuance of these presents, provide and furnish, free of rent and taxes, a store at Innisfail suitable for carrying on the business of a general merchant.

2. H. will supply to W. and M. his wife at Innisfail all such goods and stock in trade as are usually necessary and

required in the trade or business of a general merchant, and replenish such stock in trade from time to time as occasion may require and H. deem expedient.

3. W. shall, except when prevented by sickness, devote the whole of his time and attention to carrying on the trade or business of a general merchant at Innisfail, and diligently employ himself therein and promote to the utmost of his powers the benefit and advantage of the same.

4. W. and his wife shall make a report to H. of the sales made and the cash balances once in each and every month during the continuance of this agreement, and shall render unto H. a general account of the stock in trade, credits, property and effects, debts and liabilities of the business, once every three months.

5. W. and his wife shall remit to H. at Calgary all moneys received by them from sales in the course of the business, such remittances to be made on Tuesday and Friday in each and every week, deducting freight charges and such amounts as may have been paid out in cash for local merchandize and farm produce.

6. H. may, from time to time and at all times, visit the store and examine all and any of the books of account kept by W. and his wife, and take an account of the stock in trade, credits, property and effects, debts and liabilities of the business, and W. and his wife shall, whenever called upon, give to H. full explanations with regard to any matters concerning the business.

7. Proper books of account shall be kept by W. and his wife, and entries immediately made therein of all receipts and payments made, and of all such matters and things as are usually entered in similar books of account.

8. The net profits of the business, after deducting all freight charges, shall be shared in equal proportions between H. and W.

9. This agreement may be determined at any time by H.

10. If W. and his wife wish to terminate this agreement, they shall give H. one month's written notice of their desire so to do.

The goods supplied by H. under this agreement having been seized under execution against W., an interpleader issue was directed to try out the title thereto.

Held, that under the agreement the goods supplied by H. were not sold to W., but H. retained such interest in them as to prevent them being liable for W.'s debts.

Judgment of the Court below affirmed.

Latchford and *McDougall*, for the appellants.

Knott, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

FALCONBRIDGE, J.] [16TH APRIL, 1898.

CRAWFORD v. BRODDY.

Costs—Appeal as to—Error in principle—Recovery of land—Construction of Will—Improvements under mistake of title—Reference.

In this action the plaintiffs claimed a certain farm, a portion of the estate of their father, under an executory devise over to them in the will of their father, after the life estate of their brother. The defendants were the executors of the will of the brother's grantee, and were in possession of the farm, asserting that their grantor's estate was not a life estate, but in fee simple or fee tail. The plaintiffs claimed, in the alternative, as two of the heirs-at-law of their brother, upon the ground that the conveyance to the defendants' testator was void for mental incapacity and fraud. The plaintiffs succeeded upon their first contention, and were awarded possession of the farm, subject to payment for the defendants' improvements, less the rents received by them.

Held, that, as the estate of the original testator was not all before the Court, nor the executors, nor all the persons

representing that estate, it was impossible to give costs out of the estate, in the ordinary sense, and an appeal lay from the judgment of the High Court ordering the costs to be paid out of the farm in question, which was wrong in principle. The costs should be disposed of as in an ordinary action for the recovery of land, in which the plaintiffs had succeeded, subject to a claim for and a balance found due to the defendants for improvements under mistake of title. There should be no costs of the trial to either party, because, although the plaintiffs ultimately succeeded upon one claim, they failed upon another; the plaintiffs should have the costs of their appeal to a Divisional Court, upon which they succeeded, although they renewed their alternative contention there; there should be no costs to either party of the reference, which was for the benefit of both, for, although the defendants had succeeded in establishing a lien for improvements, they were not in the position of a mortgagee or chargee who has taken possession in order to obtain payment of his debt; and the plaintiffs should have the costs of the motion for judgment on further directions.

Judgment of FALCONBRIDGE, J., reversed.

J. C. Hamilton, for the appellants.

W. H. McFadden and *T. J. Blain*, for the respondents.

HIGH COURT OF JUSTICE.

[ROSE, J., MACMAHON, J., 12TH OCTOBER, 1898.

CAMPBELL v. DOHERTY.

Venue—Change of—Cause of action—Convenience—Expense—Right of plaintiff.

The injury on account of which the plaintiff sued was received by him in the defendants' building in the county of Huron, but the plaintiff afterwards went to live in the county of Wentworth, and named Hamilton as the place of trial.

Held, that the defendants' application to change the venue to Goderich could not be granted, the difference in

expense not being more than $40, and the number of witnesses in the county of Huron not exceeding the number in Wentworth by more than four.

J. Dickson, for the plaintiff.

J. H. Moss, for the defendants.

[Leave to appeal was refused by the Court of Appeal on the 16th November, 1898, the opinion being expressed that it was well settled practice that the plaintiff had the right to name the place of trial, and his choice would not be interfered with except on substantial grounds.]

[BOYD, C., ROBERTSON, J., 10TH NOVEMBER, 1898.

MALCOLM v. PERTH MUTUAL FIRE INS. CO.

Malicious prosecution—Reasonable and probable cause—Burden of proof—Nonsuit.

In an action for the malicious prosecution of a charge of arson against the plaintiff:—

Held, affirming the judgment of ROSE, J., 29 O. R. 406, *ante* 263, that the burden was on the plaintiff to show that the defendants acted without reasonable and probable cause, and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited.

Brewster, for the plaintiff.

J. P. Mabee, for the defendants.

ANDERSON v. HENRY.

Distress—Rent—Delay in sale—Distress left on demised premises—Bond by tenant—Abandonment—Goods in custodia legis.

Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties.

Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops and not to remove or allow them to be removed from the premises and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary.

Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee.

McIntyre v. *Stata*, 4 C. P. 248, *Roe* v. *Roper*, 27 C. P. 76 and *Whimsell* v. *Gifford*, 3 O. R. 1, distinguished.

Langtry v. *Clark*, 27 O. R. 280, distinguished and not followed.

A. H. Macdonald, Q.C., and *Drew*, for the plaintiffs.

E. F. B. Johnston, Q.C., for the defendants.

[BOYD, C., FERGUSON, J., MEREDITH, J., 17th NOVEMBER, 1898.

In re EASTMAN.

Appeal—To Divisional Court—From Surrogate Court—Notice—Affidavit—Security.

A motion by the executors of the will of Chester M. Eastman to quash an appeal, by certain of the beneficiaries under the will, from an order made on the 13th July, 1898, by the Judge of the Surrogate Court of the County of Lambton, fixing at $600 the compensation of the executors for their care, pains, and trouble in and about the estate.

J. H. Moss, for the motion, contended that, as no notice of appeal was served until September, no affidavit was filed by the appellants shewing the amount involved in the appeal, and no security was given for costs, as required by the Surrogate Court Rules, the appeal was properly lodged.

S. Alfred Jones, for the appellants, contended that long vacation was not to be reckoned in the time for appealing, and that the aflidavit and security were unnecessary under the present practice.

THE COURT made an order quashing the appeal, but without costs, owing to the confusion and uncertainty of the practice.

Per BOYD, C.—The notice was insufficient.

Per FERGUSON and MEREDITH, JJ.—The security seems to be necessary. The Surrogate Courts Act and Rules seem to govern the matter.

[BOYD, C., 31ST OCTOBER, 1898.

DELAP v. ROBINSON.

Interim injunction—Undertaking for damages—Foreign plaintiff.

Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction.

Arnoldi, Q.C., for the plaintiff.

C. C. Robinson, for the defendants.

In re SUPREME LEGION SELECT KNIGHTS OF CANADA.

CUNNINGHAM'S CASE.

Life insurance—Friendly society—Liquidation—Master's report—Practice—Notice of filing—Appeal—Total disability benefit—Repeal of provisions as to—Assessments—Non-payment—Suspension—"Fixed dates"—Time—Notice.

The provision of Con. Rule 769 that notice of filing a Master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute. Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R. S. O. c. 203, notice of filing the report given in the *Ontario Gazette* and other newspaper, pursuant to s. 193 of that Act, is not tantamount to personal service.

Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and

repealed by the society during the membership of the insured: —

Held, that he was bound by such action.

Baker v. *Forest City Lodge*, 28 O. R. 238, 24 A. R. 585, followed.

By s. 165 of R. S. O. c. 203 it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given, as mentioned in s.-s. (2), and default thereafter for not less than thirty days. The meaning is that in the case of assessments which by implication are of fixed amount, and which by the rules or constitution of the society are payable at fixed dates, it is left to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure.

By the constitution and rules of the society, the amount and frequency of the assessment depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble according to the needs of the society.

Held, that the assessments could not be regarded as "payable at fixed dates;" and as, in the case of the member whose standing was in question, the notice to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred.

Hartley v. *Allen*, 4 Jur. N. S. 500, 31 L. T. O. S. 70, 6 W. R. 407, not followed.

Llewellyn v. *Ross*, 35 Beav. 592, *Re Maxwell*, 1 H. & M. 615, *St. Aubyn* v. *St. Aubyn*, 7 Dr. & Sm. 620, and *Jones* v. *Ogle*, L. R. 8 Ch. 198, specially referred to.

A. B. Cunningham, for the claimant.

J. H. Hunter, the Insurance Registrar, in person.

D. F. MacWatt, the receiver, in person.

IN CHAMBERS.

[BOYD, C., 31ST OCTOBER, 1898.

In re HUMPHRIES, MORTIMER v. HUMPHRIES.

Payment into Court—Infants' moneys in hands of executor.

Where infants are entitled to maintenance out of a fund in the hands of the executor of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into Court.

Kingsmill v. *Miller*, 15 Gr. 171, and *Governesses' Benevolent Institution* v. *Rusbridger*, 18 Beav. 467, followed.

E. D. Armour, Q.C., for the applicant.

H. F. Hunter, for the executor.

Langton, Q.C., for residuary legatees.

F. W. Harcourt, for infants.

[MEREDITH, C.J., 12TH NOVEMBER, 1898.

CAMPBELL v. DUNN.

Costs—Interlocutory motions—Costs out of estate—Consent judgment without costs—Effect of.

Certain interlocutory orders awarded "costs to all parties out of the estate." At the hearing the parties settled the action, and a consent judgment was entered, which directed that "the parties other than the official guardian do pay their own costs." The plaintiffs, however, claimed the costs awarded by the interlocutory orders.

Held, reversing the ruling of the local Master at Woodstock, that the disposition of costs made by the consent judgment must be taken to apply to all costs of the litigation, including those upon interlocutory motions, and that the plaintiffs were not entitled to tax the costs which they claimed.

F. A. Anglin, for the plaintiffs.

J. H. Moss, for the adult defendants.

A. J. Boyd, for the infant defendants.

[ROSE, J., 25TH OCTOBER, 1898.

CONFEDERATION LIFE ASSOCIATION v. LABATT.

Notice of trial—Close of pleadings—Reopening—Order permitting third parties to defend.

Where a third party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiff to be tried at Toronto without a jury, and notice of trial given before the plaintiffs were aware that such third party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:—

Held, that the order made upon such motion, which permitted the third parties to come in and defend, and directed that the issue between the defendant and the third parties should be tried at the same time as the action, re-opened the pleadings, and they were not closed (the third parties having delivered a defence) until the expiration of the time for replying to that defence. The duty of the plaintiffs then was to draw up a new record of the pleadings, including in it the defence of the third parties, enter the case again for trial, and give notice of trial to the defendant and third parties, under Rule 542.

Nasmith, for the plaintiffs.

Rowell, for the defendant.

Kilmer, for the third parties.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 10TH NOVEMBER, 1898.

FOULDS v. FOULDS.

Statutes—Retroactivity—Provision for registration of alimony decree—Application to previously existing decree.

Appeal from an order of the referee. The plaintiff instituted a suit for alimony, and obtained a decree in 1889. In 1898, after the coming in force of the Queen's Bench Act, 1895, the plaintiff caused a certificate of the decree to be registered in the Winnipeg Land Titles Office, when the defendant moved for an order setting aside the registration, contending that s. 31 of the Queen's Bench Act, 1895, providing for the registration of orders for alimony, was not retrospective.

The referee dismissed the application, and the defendant appealed.

Held, dismissing the appeal, that s. 31 authorized the registration of a certificate of a previously existing decree for alimony. Legislation relating to procedure only, or improving the remedy, is *prima facie* applicable to prior existing proceedings or rights: *Wright* v. *Hale*, 6 H. & N. 227; *Weldon* v. *Winslow*, 13 Q. B. D. 784.

Having reference to ss. 92 and 94 of the Act and Rule 983, the Act appeared to contemplate that proceedings upon previous judgments and decrees of the Court should be taken under the new practice, as far as it could be made applicable.

Mathers, for the plaintiff.

Mulock, Q.C., for the defendant.

Supreme Court of Canada.

ONTARIO.] [18TH OCTOBER, 1898.

BOULTBEE v. GZOWSKI.

Principal and agent—Broker—Stock exchange custom—Scale of shares—Marginal transfer—Undisclosed principal—Acceptance—"Settlement"—Obligations of purchaser—Construction of contract—The Bank Act, R. S. C. c. 120, ss. 70-77—Liability of shareholders—"Stock jobbing."

The defendant, a broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal, and the name of a principal was not disclosed within the time limited for "settlement" of transactions by the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant, who, three days after settlement was due, according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions, and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of the Bank Act, for which he afterwards recovered judgment against C., and then, taking an assignment of C.'s right of indemnity against the defendant, instituted the present action.

Held, that, as the defendant had not disclosed the name of any principal within the time limited for settlement by

the custom of the exchange, and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books, and that as such he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of the Bank Act.

Judgment of the Court of Appeal, 24 A. R. 502, 17 Occ. N. 357, reversed, and judgment of a Divisional Court, 28 O. R. 285, 17 Occ. N. 79, restored.

H. J. Scott, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent.

QUEBEC.]

VADEBONCOEUR v. CITY OF MONTREAL.

Title to land—Entail—Life estate—Fiduciary substitution—Privileges and hypothecs—16 V. c. 25—Mortgage by institute—Preferred claim—Prior incumbrancer—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Vis major—Estoppel—Sheriff's deed—Deed-poll—Improvements on substituted property—Grosses réparations.

Upon being judicially authorized, the institute in possession of a parcel of land in the city of Montreal, *grevé de substitution*, and a curator appointed to the substitution, mortgaged the land, under the provisions of the Act for the relief of sufferers by the Montreal fire of 1852, 16 V. c. 25, to obtain a loan, which was expended in reconstructing buildings on the property. Default was made in payment of the mortgage, and the mortgagor obtained judgment against the institute, and caused the land to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that, as the mortgage had been judicially authorized, and was given special preference by the statute superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the land from the substitution not yet open, and effectually passed the title to the purchaser

for the whole estate, including that of the substitute as well asthat of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the lands.

An institute *greve de substitution* may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses réparations*) upon obtaining judicial authorization, and in such a case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.

The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure, and in the deed to the purchaser,as *grevé de substitution.*

Held, that the term used was merely descriptive of the defendant, and did not limit the estate seized, sold, or conveyed under the execution.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, TASCHEREAU and KING, JJ., dissenting.

Held, further, per TASCHEREAU, J., that Art. 2172 of the Civil Code of Lower Canada, as interpreted by the statute 29 V. c. 26, applies to hypothetics and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

Belcourt, for the appellant.

Ethier, Q.C., for the respondent.

NEW BRUNSWICK.] [21ST NOVEMBER, 1898.

COMMERCIAL UNION INS. CO. v. TEMPLE.

Fire insurance—Condition in policy—Notice of additional insurance—Liability of assured to give notice.

A policy of insurance against fire contained the following among other conditions :

"11. Persons who have insured property with this company must forthwith give notice of any other insurance already made, or which shall afterwards be made, on the same property, and have a memorandum of such other insurance indorsed on the policy or policies effected with this company, otherwise this policy will be void: provided, however, that on such notice being given at any time after the issue of the policy, it shall be optional with the company to cancel such policy. In the event of any other insurance on the property herein described having been once declared as aforesaid, then this company shall, if this policy shall remain in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage, whether such other insurance be in force or not, unless the discontinuance of such other insurance shall have been previously agreed to by this company by indorsement upon the policy."

On the 10th July, 1895, while the policy was in force, application was made on behalf of the insured for additional insurance in another company. On the 17th July this application was accepted, but notice of such acceptance did not reach the assured until the 20th. On the 18th July the insured property was burnt, and the company refused payment of the insurance, on the ground that the policy was void for want of notice of the additional insurance and indorsement thereof, as required by the condition.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy was not avoided; that the condition did not require the assured to give notice of an insurance of which he had no knowledge; but only covered the case of insurance effected before a loss, of which notice could be given also before the loss.

Stockton, Q.C., and *Dixon*, for the appellants.

Pugsley, Q.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 3RD NOVEMBER, 1898.

TYRRELL v. THE QUEEN.

Exchequer Court—Reference of claim to—Decision of Minister of Customs—R. S. C. c. 32, ss. 182, 183—Evidence—Appeal.

A reference, under the provisions of s. 182 of the Customs Act, of a claim in respect of the Minister's decision with which the claimant is dissatisfied, is not to be regarded as an appeal to the Exchequer Court from such decision. Under the provisions of s. 183 the Court may deal with the matter upon the evidence before the Court, whether such evidence has been before the Minister or not.

W. Pugsley, Q.C., and *J. M. Stevens*, for the claimant.

A. O. Earle and *E. H. MacAlpine*, for the Crown.

NOVA SCOTIA ADMIRALTY DISTRICT.

[MACDONALD, LOC. J., OCTOBER, 1898.

INCHMAREE STEAMSHIP CO. v. THE "ASTRID."

Maritime law—Collision—Rules 16 and 20 (1884).

Held, following *The Franconia*, 2 P. D. 8, that where two ships are in such a position, and are on such courses, and are at such distances, that if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship going faster than the other, the former is to be considered as an overtaking ship within the meaning of Rule 20, and must keep out of the way of the latter.

2. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of Rule 16.

See now Rule 24 of the Collision Rules adopted by order of the Queen in Council on the 9th February, 1897, and which came into force on the 6th July, 1897.

R. C. Weldon, for the plaintiffs.

A. Drysdale, Q.C., for the defendants.

NEW BRUNSWICK ADMIRALTY DISTRICT.

[McLeod, Loc. J., 26th February, 1898.

LAHEY v. THE "MAPLE LEAF."

Maritime law—Yacht dragging anchor in public harbour—Salvage—Jurisdiction—R. S. C. c. 81, s. 44.

A yacht, with no one on board, broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger.

Held, that they were entitled to salvage.

2. The plaintiffs demanded the sum of $100 for their services.

Held, that, inasmuch as the right to salvage was disputed, the provisions of s. 44 of R. S. C. c. 81 did not apply, and that the Court had jurisdiction in respect of the action.

W. H. Trueman, for the plaintiffs.

J. R. Dunn, for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [15TH NOVEMBER, 1898

MILLER v. LEA.

Action—Assault—Bar—Criminal prosecution—Civil remedy.

The civil right of action to recover damages for assault is not taken away by the criminal prosecution and dismissal or punishment of the offender, unless the complaint has been preferred by or on behalf of the person aggrieved. Where a summons is issued by a peace officer of his own motion, although the person aggrieved attends the hearing and gives evidence, the right of action remains.

Judgment of a Divisional Court reversed.

W. Nesbitt and *W. J. Clark*, for the appellant.

Delamere, Q.C., and *F. C. Snider*, for the respondent.

MILES v. ANKATELL.

Fixtures—Mortgagor and mortgagee—Wooden building.

A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, and used at first as a booth or shop, and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband, who swore that it was placed on the land without any intention of leaving it there permanently.

Judgment of a Divisional Court, 29 O. R. 21, *ante* 14, reversed.

J. Bicknell, for the appellant.

W. J. Clark and *G. H. Galbraith*, for the respondent.

GIGNAC v. ILER.

Bankruptcy and insolvency—Fraudulent conveyance—Consideration—Untrue statement—Onus of proof—Sheriff.

An appeal by the plaintiff from the judgment of a Divisional Court, 29 O. R. 147, *ante* 80, was dismissed with costs, the Court holding, on the evidence, that the deed was void under the Statute of Elizabeth.

F. E. Hodgins and *F. D. Davis*, for the appellant.

J. C. Hamilton and *S. White*, for the respondents.

BOYD, C.]

BAKER v. STUART.

Devolution of Estates Act—Dower—Election—R. S. O. c. 127, s. 4.

Where, in the administration by the Court of the estate of an intestate, lands have been sold and the purchase money paid into Court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act.

Judgment of BOYD, C., 29 O. R. 388, *ante* 174, affirmed.

J. H. Moss, for the appellants.

E. D. Armour, Q.C., for the respondent.

ARMOUR, C. J.] [4TH OCTOBER, 1898

COUNTY OF SIMCOE v. BURTON.

Principal and surety—Bond—Municipal treasurer—Audit—Representations.

The treasurer of a county for a number of years embezzled county funds, and by manipulation of his books

deceived the county auditors, who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While the treasurer was in fact in default to a large amount, the defendant, who was a ratepayer resident in the country and a relative of the treasurer, became at his request one of his sureties, and at the same time was told in good faith by some of the county officials that the treasurer's accounts were correct.

Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.

Held, also, that the statements made by the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence.

Judgment of ARMOUR, C.J., reversed.

Osler, Q.C., and *J. A. McCarthy*, for the appellants.

Aylesworth, Q.C., and *W. A. Boys*, for the respondent.

GREAT NORTHERN TRANSIT CO. v. ALLIANCE INSURANCE CO.

Marine insurance—Construction of policy—Condition.

The defendants insured a vessel for a stated period, "whilst running on the inland lakes, rivers, and canals, during the season of navigation, to be laid up in a place of safety during winter months from any extra hazardous building." At the time of the issue of the policy the vessel was at a dock in inland waters and remained there unused, though at all times in condition to be used, for more than two years, when she was destroyed by fire, the policy having been kept in force.

Held, per BURTON, C.J.O., and OSLER, J.A., that the risk did not attach, the meaning of the policy being that the vessel was insured during the season of navigation only while in commission.

Held, per MACLENNAN and MOSS, JJ.A., that the phrase in question was used merely to limit the risk geographically, and that the risk did attach.

In the result the judgment of ARMOUR, C.J., in favour of the plaintiffs, was affirmed.

W. Nesbitt and *R. McKay*, for the appellants.

McCarthy, Q.C., *W. M. Douglas*, and *C. S. MacInnes*, for the respondents.

[15TH NOVEMBER, 1898.

TOWNSHIP OF LOGAN v. TOWNSHIP OF McKILLOP.

Ditches and watercourses—57 V. c. 55—Owner—Appeal from award—Service of notices—Deepening ditch.

Where in proceedings under the Ditches and Watercourses Act, 57 V. c. 55, a declaration of ownership has been made and filed by the person initiating the proceedings, any objection to his status as owner must be brought before and decided by the County Judge; the effect of s. 24 being that the award when made cannot be impeached on such a ground.

York v. *Township of Osgoode*, 24 O. R. 12; 21 A. R. 168; 24 S. C. R. 282, distinguished.

Per MACLENNAN, J.A., BURTON, C.J.O., and MOSS, J.A., *contra*:—A person in possession of land under a lease with an option to purchase, no default having occurred, is the owner of land within the meaning of the Ditches and Watercourses Act, 57 V. c. 55, and as such entitled to join in initiating proceedings thereunder.

Per OSLER, MACLENNAN, and MOSS, JJ.A.:—Where land affected by a proposed work is vested in several persons as devisees in trust, none of them living upon the land, service of notice of proceedings under the Ditches and Watercourses Act upon one of them for all is sufficient; at any rate ss. 23 and 24 cure any objection of this kind.

Per OSLER, MACLENNAN, and MOSS, JJ.A.:—Section 36 of the Act applies where a ditch has been completed and a new arrangement is necessary in regard to its maintenance; it does not apply where a ditch is being deepened or extended; and for work of that kind the two years' limitation is not in force.

In the result the judgment of ARMOUR, C.J., was reversed; BURTON, C.J.O., dissenting.

Garrow, Q.C., for the appellants.

Shepley, Q.C., for the respondents.

HESKETH v. CITY OF TORONTO.

Municipal corporations—Fire brigade—Negligence—Damages.

A municipal corporation is liable in damages when the death of a person is caused by negligence, while in the performance of their duty, of members of a fire brigade organized and maintained by it.

Judgment of ARMOUR, C.J., affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for the appellants.

George Wilkie, for the respondent.

ROSE, J.] [4TH OCTOBER, 1898.

KER v. LITTLE.

Easement—Right of way—Prescription—Landlord and tenant—Acknowledgment by tenant.

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription, the tenant of the dominant tenement, without the knowledge of the owner, gave to the owner of the servient tenement two pairs of shoes as consideration for the exercise of the right:—

Held, that, even if an act of this kind could in any event affect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority.

Judgment of ROSE, J., affirmed.

DuVernet and *W. J. Millican*, for the appellant.

Aylesworth, Q.C., for the respondents.

ROBERTSON, J.] [18TH JUNE, 1898.

In re JENISON AND KAKABEKA FALLS LAND AND ELECTRIC CO.

Arbitration and award—Arbitrator—Refusal to state case.

When questions of law arise in the course of arbitration proceedings, any party thereto may apply to the arbitrator to state a case for the opinion of the Court, and in the event of his refusal may apply to the Court to compel him to do so.

The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal.

On the merits the judgment of ROBERTSON, J., refusing to order the arbitrator to state a case, was affirmed.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

E. F. B. Johnston, Q.C., for the respondent.

[15TH NOVEMBER, 1898.

CURRAN v. GRAND TRUNK R. W. CO.

Railways—Omission of statutory duty—Dominion Railway Act, 51 V. c. 29, s. 289—Constitutional law—Workmen's Compensation Act—Executors and administrators—Damages—Reduction of—New trial.

Section 289 of the Dominion Railway Act, 51 V. c. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained," is *intra vires*, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section.

The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under Lord Campbell's Act, without waiting six months.

Judgment of ROBERTSON, J., affirmed.

The Court, thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial unless the plaintiffs accepted a reduced amount.

H. S. Osler, for the appellants.

Lynch-Staunton, for the respondents.

MACMAHON, J.]

HENDERSON v. CANADA ATLANTIC R. W. CO.

Railways—Highway crossing—Statutory warning—Damages—Mental shock.

The statutory warning required to be given where a line of railway crosses a highway on the level is for the benefit not only of persons crossing the line of railway, but also of persons lawfully using the highway and approaching the line of railway.

Where, therefore, owing to the failure of the defendants to give the statutory warning, or any equivalent warning, the plaintiff drove close to their line of railway, and his horses were frightened by a passing engine and injury resulted, he was held entitled to recover.

Damages for "mental shock" are not recoverable.

Victoria Railway Commissioners v. *Coultas*, 13 App. Cas. 229, followed.

Judgment of MACMAHON, J., affirmed.

Osler, Q.C., and *Chrysler*, Q.C., for the appellants.

W. Nesbitt and *Glyn Osler*, for the respondent.

STREET, J.]

CITY OF KINGSTON v. KINGSTON, ETC., ELECTRIC R. W. CO.

Street railways—Contract—Running cars—Specific performance—Injunction—Mandamus.

The Court will not order specific performance of an agreement by an electric railway company to run its cars on

certain streets at certain hours and with certain officers, as the Court cannot oversee the carrying out of the judgment if granted. Nor will the Court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out *in toto*, as this would also involve the same minute supervision.

Nor will the Court direct in an action the issue of a writ of *mandamus*, where the duty to be fulfilled arises out of an agreement of this kind, the performance of which in specie is not deemed enforceable by the Court.

Semble, that a prerogative writ of *mandamus* cannot be granted in an action but only on motion, but even if it can be granted in an action, it will not be granted to enforce such an agreement, which, though ratified by an Act of the Legislature, remains a private contract.

Judgment of STREET, J., 28 O. R. 399, 17 Occ. N. 192, affirmed; MACLENNAN, J.A., dissenting.

Robinson, Q.C., and *D. M. McIntyre*, for the appellants.

Aylesworth, Q.C., and *W. F. Nickle*, for the respondents.

DRAINAGE REFEREE.]

McCULLOCH v. TOWNSHIP OF CALEDONIA.

Drainage—Invalid by-law—Damages—Charging assessed area.

Upon the receipt of a petition from certain property owners, the municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, and directed an engineer to make the usual report. The engineer made his report and assessed the cost of the work against lands in the three townships, but on the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, and without notice to the other townships, passed a by-law for the construction of the works, adopting with some changes the report already made.

Held, that this by-law was void.

Where a by-law for the construction of drainage works is void, damages awarded to a land owner because of injury to his crops caused by the negligent construction of the work are not to be assessed against the drainage area assessed for the work, but are chargeable against the initiating municipality.

Judgment of the Drainage Referee reversed in part.

J. M. McEvoy and *A. McCrimmon*, for the appellant.

Robinson, Q.C., and *W. S. Hall*, for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C. J., ROSE, J., MACMAHON, J., 31ST OCTOBER, 1898.

SYNOD OF THE DIOCESE OF TORONTO v. FISKEN.

Landlord and tenant—Action for rent and possession—Parties—Judgment for possession against tenant—Effect of, on sub-tenants.

In an action by a landlord for overdue rent and possession of the premises, under a clause for re-entry contained in the lease, it is not necessary to make sub-tenants parties defendant, and a judgment may be given against the tenant for possession under which the sub-tenants must go out.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., for the plaintiffs.

No one appeared for the defendant.

[1ST NOVEMBER, 1898.

HEYD v. MILLAR.

Chose in action—Verbal equitable assignment—Subsequent written assignment—Priorities.

A present appropriation, by order, of a particular fund operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity.

The wife of a man who was indebted for costs to a firm of solicitors, with her husband's authority, verbally instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, of which another member of the old firm was the principal member.

Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee of the same by a written assignment subsequently made.

Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of the land when sold.

Judgment of the County Court of the county of York reversed.

W. R. Riddell, for the defendants.

L. F. Heyd, the plaintiff, in person.

[ARMOUR, C.J., STREET, J., 1ST NOVEMBER, 1898.

LAIDLAW v. LEAR.

Letters—Publication of—Breach of duty as clerk—Injunction—Interference with criminal justice.

Anyone employed as a clerk is under an implied contract that he will not make public that which he learns in the execution of his duty as such clerk.

A stenographer who had taken notes of certain letters while employed in a solicitor's office, and had carried them away with him on being dismissed, was restrained from publishing them, as was also a third party who had obtained them from him, and who had no greater right to them.

As the letters furnished no evidence of any crime, the enjoining of their publication was no interference with criminal justice.

Judgment of FALCONBRIDGE, J., affirmed.

Osler, Q.C., *E. F. B. Johnston*, Q.C., and *W. B. Raymond*, for the plaintiffs.

Love, for the defendant Lear.

The defendant Macdonald, in person.

[11TH NOVEMBER, 1898.

BOLLANDER v. CITY OF OTTAWA.

Municipal corporations—By-law—Auctioneer—"Regulating and governing Prohibiting—Markets—Regulation of.

The power to regulate and govern conferred on municipal councils by s.-s. 2 of s. 495 of R. S. O. 1887 c. 184 did not give power to prohibit the exercise of any lawful calling; and a by-law which prohibits an auctioneer from exercising his calling cannot be supported under that sub-section, as amended by 56 V. c. 55, s. 19, and 57 V. c. 50, s. 8.

The power given by s.-s. 2 of s. 503 to pass by-laws "for regulating all markets established and to be established" gives no implied power to prevent an auctioneer exercising his calling in the markets, but he may be prevented from selling therein any commodities but those for the sale of which the markets were established.

Judgment of MACMAHON, J., reversed.

George F. Henderson, for the plaintiff.

L. G. McCarthy, for the defendants.

[25TH NOVEMBER, 1898.

WALKER v. GURNEY-TILDEN CO.

Solicitor—Lien—Settlement of action—Notice—Collusion—Fruits of litigation—Ascertainment of amount due solicitor—Collateral proceeding.

After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken

into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff.

Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien.

Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitors' costs, but had to be determined in another proceeding before the determination of such motion.

Shepley, Q.C., and *J. H. Denton*, for the defendants.

Washington, for the plaintiff's solicitors.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 21ST NOVEMBER, 1898.

CASTON v. CITY OF TORONTO.

Assessment and taxes—Collector's return to treasurer of unpaid taxes—Return to clerk—Necessity for—Collector's affidavit—R. S. O. 1887 c. 193, ss. 135, 136.

It is for the interest both of municipalities and ratepayers that all the provisions in the Assessment Act for the collection of taxes should be strictly followed, especially where the words are mandatory and there is nothing in the context to show they are permissive.

There being sufficient property upon premises upon which taxes were due out of which they could have been made, the taxes could not be legally returned to the treasurer under s. 135 of R. S. O. 1887 c. 193, nor legally placed upon a subsequent collector's roll.

The requirements of that section are imperative; and where a collector does not conform to them in showing on his account delivered to the treasurer, opposite to each assessment, the reason he could not collect the taxes, and does not furnish a duplicate account to the clerk, the account so delivered to the treasurer cannot form a basis for any further proceedings to collect the taxes; and the affidavit provided for in s. 136 does not heal the breach of the observance of such requirements.

Judgment of MEREDITH, C.J., reversed on a point of law brought out on further evidence subsequently taken.

Clute, Q.C., and *J. W. McCullough*, for the plaintiff.

Fullerton, Q.C., and *W. C. Chisholm*, for the defendants.

[MEREDITH, C.J., MACMAHON, J., 14TH DECEMBER, 1898.

STUART v. McVICAR.

Judgment—Specific performance and damages—Interlocutory judgment—Subsequent delivery of statement of claim——Assessment of damages.

The writ of summons was indorsed with a claim for specific performance of an agreement "and for damages for breach of the said agreement." The defendant not appearing, interlocutory judgment was signed against him on the 16th April, 1898, for damages to be assessed. On the 12th May following, a statement of claim was delivered, and on the 16th May the damages were assessed by a Judge of the High Court at a sittings for the trial of actions.

Held, that the interlocutory judgment was irregular; the plaintiffs, upon default of appearance, should have delivered a statement of claim, and, if no defence delivered, proceeded to judgment by motion.

Held, also, that the plaintiffs had no right to treat the statement of claim delivered by them as nugatory, and proceed to assessment of damages on the writ of summons as forming the record.

Semble, that the plaintiffs could properly claim specific performance, and, in the alternative, damages for breach of the agreement.

Watson, Q.C., for the plaintiffs.

W. E. Middleton, for the defendant.

[ARMOUR, C. J., 17TH NOVEMBER, 1898.

In re McLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Municipal corporations—Arbitration and award—Appeal—Time—Filing—Notice.

An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation is an award which does not require adoption by the council, but is subject to an appeal to the High Court, as provided by R. S. O. c. 223, s. 465; and the practice as to the appeal is governed by R. S. O. c. 62, ss. 31, 34, 47.

Where it is not shown that such an award has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail.

T. J. Blain, for the landowner.

McKechnie, for the municipality.

[FERGUSON, J., 26TH SEPTEMBER, 1898.

TOWNSHIP OF STAMFORD v. VILLAGE OF NIAGARA FALLS.

Municipal corporations—Original road allowance between village and township—Joint liability to keep in repair—R.S.O. c. 223, s. 622—Damage.

The centre line of an original road allowance constituted the dividing line between a village and a township. Each municipality, at first, kept in repair the half within its limits.

Resolutions were then passed by each municipality providing that the whole road should be kept in repair by the village corporation. This the village corporation did, the township keeping in repair other roads similarly situated, but as to which no by-laws were passed. In order to repair and widen the road, the village corporation entered upon and took sand from the half thereof within the township limits.

Held, that the village corporation was acting within its powers, for it had the right to enter and repair the road regardless of the half thereof upon which the repairs were done, s. 622 of the Municipal Act, R. S. O. c. 223, creating a joint jurisdiction and liability therefor.

A claim for damages by reason of the taking of the sand and alleged damage to a High School building was disallowed.

W. M. Douglas and *F. W. Hill*, for the plaintiffs.

F. W. Griffiths, for the defendants.

[MacMahon, J., 12th October, 1898.

BABE v. BOARD OF TRADE OF TORONTO.

Insurance—Life—Benefit society—Designations of persons to be benefitted—Will.

A gratuity certificate issued by the board of trade to a member thereof was made subject to the by-laws of the board, whereby the amount of the gratuity was payable to certain persons, or a class of persons, and in such proportion as might be designated by the member, in writing and under his signature, a blank being left in the certificate for such designation, and unless so designated, the amount was made payable, where there was a wife and children, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member. By his will he directed that after the payment of his debts and funeral expenses all his estate should be converted into cash, etc., and the widow should have the same for her life, and after her death it should be equally divided amongst his children.

Held, that the fund formed no part of the deceased's estate, and therefore did not pass under his will, but went to the widow and children to be divided between them as provided for by the by-laws governing the fund.

John MacGregor and *H. M. East*, for the plaintiffs.

W. R. Riddell, for the defendants the Board of Trade.

J. M. Godfrey, for the adult children.

A. J. Boyd, for the infant children.

[10TH NOVEMBER, 1898.

SHERWOOD v. BALCH.

Arbitration and award—Motion to stay proceedings in action on contract—Provision for arbitration—Alleged bias of arbitrator—R.S.O. c. 62, s. 6.

Motion for an order staying proceedings in an action under s. 6 of the Arbitrations Act, R. S. O. c. 62.

The action was to recover a balance claimed to be due under a contract for construction of a railway. The contract contained a clause that in case of any disputes or differences as to the meaning of the agreement, prices to be paid, etc., such disputes should be referred to a named engineer, whose decision should be final, and to whose arbitration the parties to the contract agreed to submit such disputes.

It appeared that a dispute had arisen as to whether, in the event of earth-work being measured in embankment instead of excavation, an increase of a certain percentage according to the soil over and above the embankment figures should be allowed. The plaintiffs contended that there was a well-known custom or usage of this country to this effect established in connection with railway contracts, while the defendants refused to recognize any such usage.

There was evidence that the engineer had publicly and privately expressed himself that no such usage existed; which the engineer did not deny, but stated that he was not satisfied that there was any such usage; but that he did not mean that he would not give the plaintiffs' contention fair and impartial consideration, should the matter come before him as arbitrator.

Held, that on this state of facts the proceedings in the action should be stayed.

Jackson v. *Barry R. W. Co.*, [1892] 1 Ch. 138, 238, specially referred to.

D. W. Saunders, for the defendants.

J. R. Code, for the plaintiffs.

[STREET, J., 15TH OCTOBER, 1898.

SELI v. SMITH.

Mortgage—Action to set aside—Registration of lis pendens—Injunction to restrain parting with mortgage—Necessity for.

The commencement of an action to set aside a mortgage as having been given without consideration and to defraud creditors, and the registration of a *lis pendens*, is notice of the plaintiff's claim so as to affect persons subsequently dealing with the mortgagees; and an injunction to restrain the mortgagees from parting with the mortgage or assigning their interest therein, is unnecessary.

An interim injunction obtained in such a case was not continued.

Masten, for the plaintiffs.

A. Elliot, for the defendants.

[5TH DECEMBER, 1898.

STEWART v. SNYDER.

Executors and administrators—Liability to account—Laches and acquiescence—Notice to claimants—Publication of—Requisites—R. S. O. c. 129, s. 38—Statute of Limitations—Administrator de bonis non.

Action by the children of Moses Clemens, deceased, against Elizabeth Clemens, his widow, John Snyder and Joseph Hagey, executors of the will of Levi Snyder, deceased, and John Clemens, administrator with the will annexed of the estate of Abraham C. Clemens remaining unadministered, to compel the defendants Snyder and Hagey to make good part of the estate of Abraham C. Clemens, which had been lost, these defendants being the executors of his last surviving executor.

The defences set up by these defendants were laches and acquiescence on the part of the plaintiffs and their mother, the Statute of Limitations, and the fact that they had fully administered the estate which came to their hands, after due notice under s. 36 of R. S. O. 1887 c. 110.

Held, that there was no evidence to sustain the defence of laches and acquiescence on the part of either the plaintiffs or their mother.

Held, that the defendants Snyder and Hagey had not protected themselves against any liability they might be under to account for or make good the fund in question, by reason of the notice they gave. Executors and trustees are only protected under s. 38 of R. S. O. c. 129, when they have given "such or the like notices as in the opinion of the Court in which such trustee is sought to be charged, would have been given by the High Court in an action for the execution of trusts . . . or an administration suit . . . for creditors and others to send in their claims." The executors should have so framed the notice as to have included in it a call for claims against the estate of Abraham C. Clemens, and should have published it in the localities where claimants against that estate resided, or else in the Ontario *Gazette*. It is necessary also that such a notice should state that the effect of a non-compliance with the notice will be to exclude the persons failing to comply with it from a participation in the property to be divided: see Form No. 79 under Rule 701.

It was immaterial whether at the time of his death Levi Snyder held this fund as executor or trustee; in either case he was responsible for it to the *cestuis que trustent*; and his executors had succeeded to that responsibility, and become entitled to the trust fund.

The widow, who was entitled to the income of this fund for life, regularly received it from one Martin until 1897, when he died, leaving no estate. Martin could not be treated as having made these payments on behalf of the executors of Levi Snyder, but on his own behalf as holder by wrong of a fund to the income of which she was entitled. Under the circumstances, the widow's claims against the executors of Levi Snyder were barred, because she has received nothing from them for more than six years, and, if she were suing, her action must be dismissed, except in so far as the fund was in existence in the hands of John Clemens as administrator *de bonis non* of Abraham C. Clemens.

In re Somerset, [1893] 1 Ch. 231, followed.

The right of the plaintiffs, the children, not yet having come into possession, they were protected from the operation of the Statute of Limitations by s. 32 (*b*) of R. S. O. c. 129.

Held, also, that the appointment of John Clemens in 1897 as the administrator *de bonis non* of Abraham C. Clemens's estate, did not in any way affect the liability of the defendants Snyder and Hagey.

Judgment, directing the payment into Court by the defendant John Clemens of the fund in his hands, being all that remained of the original trust fund; the balance which had been lost to be made good by the defendants Snyder and Hagey; the income of the portion to be made good, which would otherwise go to Elizabeth Clemens, to be retained by them to help them make good the amount of their loss. If these defendants so desired, they might have the beneficiaries who had received their share of the estate of Levi Snyder made parties in the Master's office, in order that the amounts paid them in error and now required to be refunded might be ascertained. No opinion expressed as to the extent to which they were entitled to require these beneficiaries to refund. The defendants Snyder and Hagey to pay the costs of the action.

M. Houston and *R. M. Thompson*, for the plaintiffs.

R. L. Gosnell, for the defendants John and Elizabeth Clemens.

E. D. Armour, Q.C., and *E. P. Clement*, for the defendants Snyder and Hagey.

HOOD v. COLEMAN PLANING MILL AND LUMBER CO. OF BURLINGTON.

Principal and surety—Recovery of judgment by creditor against surety—Subsequent payment of dividend from principal's estate—Indemnity—Apportionment.

The Fort Erie Jockey Club employed the defendants to erect some buildings for them, and owed them nearly $15,000

as the unpaid balance. The defendants pressed for payment, and finally, the plaintiff, a director of the Jockey Club, indorsed the club's note for $5,000 to the defendants, as surety for the club. The defendants indorsed the note to the Bank of Hamilton, who recovered judgment for the full amount against the plaintiff. Proceedings under the Mechanics' Lien Act were taken in the meantime by lien-holders upon the Jockey Club property, under which the property was sold. The defendants proved in the Master's office for their whole debt, including the portion covered by the note, and received a dividend of eighty-one cents in the dollar upon it.

The action was brought for a declaration that the plaintiff indorsed the note for the accommodation of the defendants, and for an order requiring them to pay it, or at all events for a declaration that they were bound to credit the dividend received, in payment, first, of this portion of the debt.

Held, that the plaintiff was entitled to have a proportion of the dividend applied upon the $5,000 note. The defendants were bound to credit each portion of the debt, the $5,000 and the $10,000, wih its proportion of the dividend, and not to take the dividends arising from both parts of the debt and credit them all upon one part of it, to the prejudice of the others: *Gray* v. *Leekham*, L. R. 7 Ch. 680.

The plaintiff, however, had not paid the full amount which he should pay upon this footing, by some $1,200 or $1,500, and he could not, therefore, require the defendants to indemnify him or to do anything for him. He could not ask the defendants to take up the note in the hands of the bank until, at all events, he had paid what he ought to pay upon it.

Judgment declaring that, as between the parties, the plaintiff was entitled to have credited upon the $5,000 note its due proportion of the dividend received. The plaintiff to pay the costs of the action.

Carscallen, Q.C., and *D'Arcy Tate*, for the plaintiff.

Washington, for the defendants.

[10TH DECEMBER, 1898.

McLEAN v. ALLEN.

Receiver—Equitable execution—Administrator ad litem—Ex parte order—Subsequent issue of letters of administration—Motion to set aside order—"Parties"—Rule 538—Administration—Advertisement for creditors.

Motion by the Toronto General Trusts Company, as administrators of the estate of the original defendant, Edwin Allen, deceased, and by Charles J. Hamilton, a creditor of the deceased, for an order vacating an *ex parte* order made by BOYD, C., on the 19th May, 1898, appointing the plaintiff receiver of the interest of the deceased defendant in the estate of his mother, also appointing Peter S. Furness administrator *ad litem* of the estate of the deceased defendant, and adding him as a defendant, and directing a reference for administration, etc.; and also for an order vacating the report of a referee made pursuant to such order.

Held, that the property and assets to which the defendant was entitled at the time of his death never vested in Peter S. Furness, because of the limited character of the administration granted to him; they vested in the Toronto General Trusts Company upon their subsequent appointment as administrators of his estate and effects, and they were bound to administer the estate, paying the debts so far as the estate would extend, ratably, in a due course of administration. They were "parties" who were affected by the *ex parte* order of the 19th May, 1898, within the meaning of Rule 538, and were entitled to apply to vacate that order and the report founded on it: *Parker* v. *McIlwain*, 17 P. R. 84.

That order was based upon the assumption that the plaintiff was the only creditor of the deceased defendant, and that, owing to almost insuperable difficulties, the plaintiff could not, and no one else was likely to, be appointed administrator. The effect and intention of the order was to give all the assets to the plaintiff, and to leave nothing for anyone else. No such order would have been made had it been known that any other creditor existed, for the plaintiff had acquired no lien by a former receivership order as to another estate, upon the property not

come to the hands of the receiver: *Croshaw* v. *Lyndhurst Ship Co.*, [1897] 2 Ch. 184; *In re Shephard*, 43 Ch. D. 1.

The report of the referee should not stand, because no advertisement for creditors was issued; this was omitted because of the mistaken notion that the plaintiff, having a receivership order, was entitled to the whole estate, it being too small to satisfy his claim. The Toronto General Trusts Company should be left to administer the estate in the usual manner, but subject to any future order for administration which might become necessary.

Order made vacating the *ex parte* order and setting aside the report, but without costs against the plaintiff. Costs of the motion to the applicants out of the estate.

J. H. Moss, for the applicants.

A. McLean Macdonell, for the plaintiff.

IN CHAMBERS.

[Rose, J., 17th November, 1898.

In re REGINA v. TORONTO R. W. CO.

Prohibition—Police magistrate—Jurisdiction over incorporated company—Service of summons—Municipal Act, s. 705—Criminal Code, ss. 562, 853, 858.

Motion for prohibition to the police magistrate for the city of Toronto to prohibit him from proceeding with the hearing of a charge against the defendants of committing an offence against a by-law of the city of Toronto passed under R. S. O. c. 223, s. 500, s.-s. 4, requiring the defendants to maintain enclosed vestibules upon the ends of their cars, upon the ground that the defendants, being an incorporated company, were not subject to the jurisdiction of the magistrate.

A summons was issued against the defendants and served upon their manager and secretary.

The offence is not an indictable one, but the procedure is under the summary convictions clauses of the Criminal Code.

Held, that the provisions of s. 705 of the Municipal Act, R. S. O. c. 223, as to summary prosecutions before a magistrate for offences against by-laws, apply to incorporated companies as well as to individuals; as do also ss. 562, 853 and 858 of the Criminal Code, as to service of summonses, and what is to follow thereupon, although some of the provisions of the latter are applicable to persons only, and others to persons and corporations; and therefore the magistrate had jurisdiction.

Regina v. *Brennen*, C. P. D., June, 1892; *Re Chapman and City of London*, 19 O. R. 33; and *Regina* v. *Eaton*, 29 O. R. 591, distinguished.

Starcy v. *Chilworth, etc., Co.*, 17 Cox 505, followed.

J. Bicknell, for the defendants.

Fullerton, Q.C., for the complainants.

[3RD DECEMBER, 1898.

In re TORONTO BRASS COMPANY.

Company—Winding-up—R. S. C. c. 129—Petition—Chambers.

An order for the winding-up of a company, upon petition, under R. S. C. c. 129, may be made by a Judge in Chambers.

J. Parkes, for the petitioner.

No one appeared for the company.

In the County Court of the County of York.

[MCDOUGALL, Co. J., 10TH NOVEMBER, 1898.

VERNEY v. GUTHRIE.

Easement—Sewer—Deed—Absence of reservation—Easement of necessity.

In 1887 one Field, the owner of a lot, built thereon two houses known as 327 and 329 Manning avenue, Toronto. He constructed but one main drain for both houses, which ran under house No. 329, the drainage system of No. 327 being connected therewith under No. 329. Field conveyed No. 329

to one Leckie, by a conveyance under the Short Forms Act, R. S. O. 1877 c. 102. The deed contained no reservation of the right of drainage for No. 327. Subsequently Field conveyed No. 327 to the defendant by a deed under the Short Forms Act, R. S. O. 1887 c. 105, which, however, contained no express reference to the drains. The plaintiff afterwards acquired from Leckie No. 329. Recently the plaintiff in making alterations in the cellar of his house No. 329 discovered that the defendant's drainage system connected with his drain and ran under house No. 329 to the common sewer in Manning avenue, a fact which was then also unknown to the defendant. It was also found that both the plaintiff's and defendant's drains were in such a defective condition as to be unsanitary. The result of this uncovering and of the defective condition of the drains was that water from the defendant's premises escaped into the plaintiff's premises, and there discharged into the cellar, causing a nuisance, which the plaintiff alleged endangered the health of himself and his family. The defendant refused to either repair or to abate the nuisance, and the plaintiff thereupon brought this action for damages and an injunction.

Held, that the defendant had acquired no easement, by virtue of his grant, to drain through the plaintiff's premises. Such an easement formed no part of the rights he acquired through Field, his grantor, because Field had not chosen to reserve any such right when conveying 329 to Leckie. Field or his assigns, therefore, could not be heard to assert such a claim in derogation of the title that had been granted to Leckie and transmitted to his assign, the plaintiff. If such a claim could not be set up, then the defendant was a trespasser.

The law upon the question is very fully considered in *Wheeldon* v. *Burrows*, 12 Ch. D. 49, where all the earlier cases upon the subject of any importance are collected and reviewed. The Court confirms this proposition, that the grantor of any person claiming under him shall not derogate from the absolute sale and grant which he has made, and if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant; and further, that there will be no

implied reservation of even an apparent and continuous easement excepting in the case of an easement of necessity.

It is quite clear that the right or privilege to discharge sewage from 327 through the drain running under 329 is not an easement of necessity. The defendant will have no difficulty in constructing a drain upon his own property to carry the sewage to the common street sewer. The original owner of the two houses, Field, when he conveyed 329 to Leckie, did not choose to reserve the right of drainage, and the defendant, as his successor in title to 327, is not at liberty to claim any such right either.

Judgment for the plaintiff for an injunction, $15 damages, and County Court costs.

D. T. Symons, for the plaintiff.

S. C. Smoke, for the defendant.

[26TH NOVEMBER, 1898.

LANDY v. NOLAN.

Life insurance—Benefit society—Assignment of certificate by member to stranger—Valuable consideration—Action for damages for member's resignation.

This was an action brought by J. J. M. Landy against M. Nolan to recover $200 damages for what was alleged to be a breach of contract in resigning from a benefit association, thereby terminating a benefit certificate issued by such association, which, the plaintiff alleged, was assigned to him under the following circumstances. Some years prior to the month of July, 1895, Nolan became a member of branch 49 of the Catholic Mutual Benefit Association of Canada, and as such member the holder of a benefit certificate or policy of insurance issued by the association, wherein Rose Nolan, his wife, was named as beneficiary. The certificate was for the sum of $2,000, payable to Rose Nolan on the death of her husband, the defendant. In the autumn of 1894 Rose Nolan died without issue, and having made no disposition by will or otherwise of the policy or the moneys payable thereunder. In the year 1895, some time after her death, the defendant

ceased paying his usual monthly dues, calls, and assessments, but the same were paid for some months by his branch. Subsequently the branch discontinued making the payments on behalf of Michael Nolan, and he was suspended for non-payment of assessments, and was liable in the month of July, 1895, to be expelled from the association and forfeit his policy for non-payment. Prior to such actual expulsion or forfeiture the plaintiff approached the defendant with a view to procure an assignment to him of the policy and to have himself made the beneficiary instead of Rose Nolan, deceased; and on the 17th July, 1895, the following agreement was entered into between the parties:

"Toronto, 17th July, 1895.

In consideration of the sum of $10 paid by J. J. M. Landy to Michael Nolan, Esq., he, the said Nolan, hereby assigns, transfers, and sets over to said Landy all rights and benefits accruing or to accrue to him under the policy No. 6500 issued to him by the C. M. B. A., assuring $2,000 on his death to his wife Rose Nolan. The said Rose Nolan having recently died, leaving no children, and having made no disposition of said policy No. 6500, or the money payable thereunder, the said Nolan agrees to surrender said policy of said association and revoke the disposition therein made in said policy, and direct and cause such payment to be made to the said J. J. M. Landy.

M. NOLAN."

The $10 mentioned in the agreement was paid to Nolan, and the plaintiff thereafter for a period paid to branch 49 the assessments and calls, including all overdue assessments, and continued to pay the same until the policy was subsequently declared forfeited. Nolan, surrendering the beneficiary certificate No. 6500, indorsed on the form upon the back of the certificate as follows:

"I, Michael Nolan, to whom the within certificate was issued, do hereby surrender the same and revoke my former direction as to the payment of the beneficiary fund at my death, and now authorize and direct such payment to me to John James Meager Landy, bearing relationship to myself ————. Dated, 17th July, 1895.

M. NOLAN."

The policy being thus surrendered, a new beneficiary certificate or policy was issued in favour of the plaintiff, dated the 17th August, 1895, which certificate bore the number 11358.

On the 12th November, 1896, some disputes having arisen between the plaintiff and defendant, the defendant seeking to have the certificate re-assigned to him, and the plaintiff demanding $500 as a consideration for assigning him the said certificate, and the defendant not being willing to pay any sum except the moneys paid out by the plaintiff for assessments and calls, which sum he tendered the plaintiff, and the plaintiff refused to accept, he, the defendant, resigned from the said association, under the by-laws of the same, and the certificate ceased to have any effect and became void. The defendant tendered $50.50, which was admitted to have been all the dues paid by the plaintiff up to the date of the tender, including the $10 paid as the alleged consideration.

W. N. Ferguson and *V. J. Hughes*, for the plaintiff.

Mulvey and *Waldron*, for the defendant.

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McDOUGALL, Co.J.—The principal question raised on the trial before me was whether the plaintiff could, under any circumstances, become a beneficiary under the charter of incorporation or the Dominion Act of incorporation of the C. M. B. A. If not, then he never took any interest under his alleged assignment or transfer of the certificate or in the policy upon the defendant's life. The original certificate, which was surrendered, substituting for the name of the deceased wife the name of the plaintiff, is dated the 15th February, 1895. The Dominion Act of incorporation was assented to in April, 1893.

I find that in the case of *Johnston* v. *Catholic Mutual Benevolent Association*, 24 A. R. 88, the whole position of certificates issued before the passage of the Dominion Act is fully considered. In that case it was held that an executor could not be named as beneficiary, because beneficiaries were restricted to members and families of members, and under the rule of the society in force at the date of that certificate,

in case of defective or inoperative appointment of a beneficiary, the fund would have to be distributed in equal shares: first, to wife and children; next to father and mother; next to brothers and sisters; and, finally, if none such, to the next of kin; and lastly, in default of these, the fund payable under the policy would revert to the association itself.

It is clear, then, that the plaintiff could not have been a beneficiary under the original certificate. Has the surrender by the defendant of his earlier certificate with a direction to the society to make the plaintiff his beneficiary, followed by the issue of a fresh certificate containing the name of the plaintiff as beneficiary, such latter issue being made under the powers conferred by the Dominion Act, altered the rights or position of the parties? It appears to me that, amongst other considerations, the answer to this question will largely depend on the construction which ought to be placed on the words, "widow, orphans, dependents, or other beneficiary whom the deceased member has designated, or to the legal representatives of such deceased member." These words occur in s. 1 (*c*) of the Dominion Act of incorporation, and are no doubt intended to limit and define the persons who may be named as beneficiaries by the insured, and to provide for the devolution of the fund where there has been no individual of the class or classes defined specially named as beneficiary. In that event the fund passes to the legal representatives of the deceased member.

I am of the opinion that the words "or other beneficiary whom the deceased member has designated," must be held to be confined to persons of the same class as those specifically named, "widow, orphans, dependents," and that it was not intended by the Legislature to confer an indefinite power upon a member of this association to name any person whatever as his beneficiary. The primary object of all these mutual benefit organizations is to provide for the family and dependents of the member. With an idea, no doubt, of encouraging this praiseworthy object, the Legislature of this Province in R. S. O. c. 211, as to societies organized under that Act, provides in s. 12 that the insurance to the extent of $2,000 shall be free from all claims by the personal representatives or creditors of the deceased.

It may be a question if the certificates issued by the C. M. B. A., they having obtained Dominion incorporation, can be claimed to be entitled to the advantages and privileges conferred by this Ontario Act, R. S. O. c. 211, but the certificate in this case, alleged to have been assigned to the plaintiff, was a certificate issued under the Provincial charter. If the Provincial charter was still in force, there appears no doubt that the plaintiff could claim no interest in the policy, for he was no kin to the defendant. This earlier certificate, however, it may, perhaps, be fairly contended, has been merged into the new certificate issued on the 31st July, 1895, by the association. And if the defendant could legally designate the plaintiff as his beneficiary in this last certificate, then the plaintiff might acquire some rights. I do not think, however, as I have stated above, that the plaintiff, being an entire stranger in blood to the defendant, can be designated as beneficiary under this last certificate.

Should I be in error as to this view, and if the plaintiff did acquire an interest under this policy, had the defendant a legal right to resign his membership at any time and thereby terminate the policy? It is not contended that there was any covenant or express contract on the part of the defendant to continue his membership, and so keep alive the policy, but it is contended that there was an implied contract to do so. It is necessary to refer to the evidence. The defendant was in arrear for assessments and suspended. He was prepared to let the policy drop. The plaintiff, who admits it was a speculation pure and simple on his part, comes to him and says, "Will you assign the policy to me? If you do I will pay the assessments and you will be relieved of any future liability or trouble about it." He tenders a long document, which contains covenants that the policy is valid and binding; that it has not been forfeited or assigned; and that the defendant would not do or suffer anything to be done which would render the policy or certificate void or cancelled. The defendant refuses to sign any such agreement or to enter into any covenant, but finally, after much coaxing, agrees to sign a simple transfer and indorse the certificate with the plaintiff's name as beneficiary in the place of the name of his dead wife. This being done, the defendant swears he thought

he was out of the policy and society as well. In *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488, at p. 491, Lord Esher states: "I have for a long time understood the rule to be that the Court has no right to imply in a written contract any such stipulation'"—not to do anything to terminate the contract—"unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

Here the plaintiff paid a nominal sum of $10, a sum, by the way, which the defendant swears he did not stipulate for, and which was suggested by the plaintiff or his father for the purchase of the right to be named beneficiary in the policy, which at the moment had practically lapsed. He besought the defendant to assign the same, his object freely admitted to be that of pure speculation, and the defendant yielded, but declined to give any covenants whatever. He stated he desired to be done with the society.

From all the surrounding circumstances, as detailed in evidence, I do not think I ought to infer any implied covenant existed not to resign his membership in the society. I do not think the plaintiff can recover from the defendant the money paid to him, the plaintiff, to the society of which he was not a member, for only a supposed breach of contract. He cannot recover it as money paid at the request of the defendant, nor as money paid under a mistake of fact, to or on account of the defendant. I think he ventured upon a most risky speculation with his eyes open, and had no recourse against the defendant upon any of the grounds urged before me.

Action dismissed with costs.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[GRAHAM, E. J., 22ND NOVEMBER, 1898.

In re McDOUGALL DISTILLERY CO.

Company—Winding-up—Notice of motion for discharge of liquidator—Commission—Power of Chambers Judge.

The solicitor for the liquidator of the company moved under the Winding-up Act to fix the commission of the liquidator and for his discharge. Only those creditors of the company who had entered appearances had been served with notice of the application.

Held, that all proper notices having been given, the liquidator must be discharged and his commission fixed at five per cent.

Per GRAHAM, E.J.—This is not the winding-up of the company, but merely the discharge of the liquidator. The Judge in Nova Scotia has no jurisdiction to wind up the company, such as the English Judges appear to have; the Act is different.

Hector McInnes, for the liquidator.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 15TH NOVEMBER, 1898.

GODDFROI v. PAULIN.

Practice—Motion to take bill pro confesso—Service of clerk's certificate.

Held, not following *MacRae* v. *MacDonald,* 1 N. B. Eq. 498, that a motion to take a bill *pro confesso* for want of a plea, answer, or demurrer, may be made, though the clerk's certificate of the state of the cause has not been served upon the defendant.

Gilbert, Q.C., for the motion.

A. I. Trueman, contra.

KING v. KEITH.

Mortgage—Rate of interest post diem.

The proviso of a mortgage stipulated for lawful interest on the principal at the rate of nine per cent. per annum payable annually, and the same rate of interest to be paid and chargeable from and after the expiration of the time appointed for the payment of the principal until the whole was paid, and overdue interest to bear interest at the rate of nine per cent. per annum.

Held, that the principal and overdue interest bore interest at nine per cent. both before and after maturity of the principal.

A. A. Stockton, Q.C., for the plaintiff.

W. B. Chandler, for the defendant.

IN CHAMBERS.

[TUCK, C.J., 25TH NOVEMBER, 1898.

SMITH v. SMITH.

Pleading—Declaration—Action against surety on administration bond—Breach—Non-payment of plaintiff's debt—Duplicity.

One William Smith died intestate and possessed of personal property. Letters of administration were granted to his widow. The defendant and one John Smith joined the administratrix in a bond to the Judge of Probate for due administration of the estate. The plaintiff was one of the next of kin and a creditor of deceased. The declaration stated that goods and chattels of deceased came to the hands of the administratrix which she could and ought to have administered upon, and out of which paid the indebtedness due the plaintiff; that the administratrix did not well and truly administer the goods and chattels of deceased, nor pay the debts due plaintiff out of the same, but converted them to her own use, whereby the estate was damnified to the amount of $500, whereby an action accrued to the plaintiff to have the policy of the bond; but the defendant did not pay the same to the plaintiff nor to the Judge of Probate, nor did he pay the plaintiff the debt due him.

The defendant applied to strike out or amend the declaration, on the following grounds:

1. That a creditor cannot assign as a breach of the bond the non-payment of his particular debt, but must sue as a trustee for the benefit of all the creditors: *Landrey* v. *Mitchell*, 3 B. & S. 405; *Archbishop of Canterbury* v. *Tupper*, 8 B. & C. 151; *Archbishop of Canterbury* v. *Robertson*, 1 Cr. & M. 690; *Bell* v. *Mills*, 25 U. C. R. 509; *Sherlock* v. *McGee*, 1 All. 116.

2. That a creditor cannot sue on breach without judgment upon his debt, or that an affidavit has been filed with the administrators: C. S. N. B. c. 52, s. 19.

3. That neither as a creditor nor as next of kin can he sue for non-administration of the estate until there has been a decree of the Probate Court.

4. That a count in the declaration alleging that plaintiff is suing as next of kin and also as a creditor is bad for duplicity: Chit. Pl. 347.

The Chief Justice refused the application, but stated that he would like to have the decision of the full Court on the points raised.

W. H. Trueman, for the defendant.

M. G. Teed, for the plaintiff.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 10TH DECEMBER, 1898.

REGINA v. HODGE.

Criminal law—Receiving stolen goods—Prisoner an accessory, before the fact, to the theft—Evidence of thief.

Crown case reserved. The prisoner was tried before DUBUC, J., upon a charge of receiving stolen property, viz., a steer, knowing it to have been stolen, and was found guilty. The main evidence on which he was convicted was that of John Pruden, who had stolen the steer, and was prosecuted for the theft; he stated he had a conversation with the prisoner about taking cattle; he told the prisoner there was a stray steer going around Scary's cattle. Next day the prisoner told Pruden he was starting a butcher shop, and if he would bring him that steer he would put it away and no one would know about it. Pruden said he would not do it. Subsequently prisoner asked Pruden to fetch the steer down, and Pruden told him he would, although he made an excuse that he had no rope, when the prisoner got him one. Pruden took the steer and took it to O'Grady's slaughter house, where he tied it to a tree; shortly afterward he met the prisoner, who went to the slaughter house. O'Grady looked at the steer and said all it was worth was $12. The prisoner gave Pruden $10 then, and was to give him $2 next day.

Pruden said the prisoner put him up to stealing the steer; had it not been for the tormenting of the prisoner he would not have done it. The prisoner bargained to give Pruden what the steer was worth when Pruden fetched it to him.

It was shown the steer was worth about $25.

Counsel for the prisoner contended that, on the evidence of Pruden, Hodge should have been prosecuted for stealing the steer jointly with Pruden, and that he should not be convicted of receiving the stolen property.

The question for the Court was: Should the prisoner, on the facts and circumstances stated, be prosecuted for theft, instead of receiving stolen property, and is he on that ground entitled to be acquitted of the offence of receiving stolen property?

Held, that the conviction should be affirmed.

A receipt which is merely an act done in the commission of the theft cannot be treated as a separate offence.

The prisoner did not actually participate in the theft, which was complete when Pruden took possession of the animal and drove it off *animo furandi*; it was not then in the prisoner's possession. He received it subsequently under an assumed sale and purchase. There is nothing inconsistent in being an accessory before the fact to a theft and the receiver of stolen property.

Patterson, for the Crown.

Bonnar and *Heap,* for the prisoner.

[DUBUC, J., 17TH NOVEMBER, 1898.

CREIGHTON v. PACIFIC COAST LUMBER CO.

Sale of goods—Purchase after inspection—Defect in quality—Caveat emptor.

The plaintiff purchased from the defendants a carload of lumber; he paid the purchase price and the freight, but after it was unloaded he insisted that it did not correspond with the description of the lumber he had bought, and brought this action to recover moneys paid by him.

The defendants alleged that the lumber was *in esse* at the time of the sale; that the plaintiff examined and inspected before completing the purchase, and satisfied himself as to its condition and quality; they denied that there was any warranty on their part.

The evidence showed that the plaintiff inspected the lumber. The trial Judge stated that he had reason to think that the plaintiff, when he gave the order, believed that the lumber would turn out better than it really did, but at the same time he found that the defendants did or said nothing to deceive him or to prevent him from making a more thorough examination of the lumber.

When the lumber arrived at Winnipeg it was unloaded from the car and hauled to a builder's yard. There it was examined and found to be of inferior quality, and the builder, for whom the plaintiff had purchased the lumber, refused to accept it.

After some negotiations for a rebate, the plaintiff finally wrote declining to accept the lumber at all.

Held, that the features of the case showed it to be in the same line as *Smith* v. *Hughes*, L. R. 6 Q. B. 597, and *Borthwick* v. *Young*, 12 A. R. 671, and that the maxim *caveat emptor* applied in those cases should be adopted in the present case.

As to the acceptance of the lumber by taking it from the car and having it transferred to the builder's yard:—

Held, following *Morton* v. *Tibbett*, 15 Q. B. 428; *Hunt* v. *Hecht*, 8 Ex. 814; *Curtis* v. *Pugh*, 10 Q. B. 111; and *Taylor* v. *Smith*, [1893] 2 Q. B. 65, that what was done in the matter was nothing more than was necessary to ascertain whether the lumber was of the quality the plaintiff had actually contracted for, and that he should not, on that account, be precluded from refusing to accept the lumber if it was in fact inferior to what he had purchased.

Verdict for the defendants.

Ewart, Q.C., and *Wilson*, for the plaintiff.

Howell, Q.C., and *Hough*, Q.C., for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUSTICES IN BANCO, 2ND DECEMBER, 1898.

FLASCHAERT v. KLEINSCHMIDT.

Appeal—To Supreme Court, North-West Territories—From Yukon Territorial Court—Action begun before separation of territory—Effect of statut on pending action.

This was an action to determine the ownership of a mine in the Yukon district, begun in the Supreme Court of the North-West Territories before that district was separated from the Territories. Judgment in the action was given by MCGUIRE, J., after the coming into force of the Yukon Act, in favour of the plaintiff. The defendant appealed to the Supreme Court of the North-West Territories *in banco*.

F. C. Wade, for the plaintiff, respondent, objected that the Court had no jurisdiction, and asked to have the appeal quashed.

Norman Mackenzie, for the defendant, the appellant, contended that the right to appeal was not affected by the recent Act, as the action was commenced before it came into force, and s.-s. 52 of s. 7 of the Interpretation Act in the Revised Statutes of Canada applied.

The judgment of the Court was delivered by

RICHARDSON, J.—In this case the Court have unanimously arrived at the conclusion that for want of jurisdiction the appeal must be quashed.

By s. 10 of the Yukon Act, which came into force on the 13th June, 1898, "There is hereby constituted and appointed a Superior Court of Record in and for the said Territory"—which by the previous s. 1 of the Act had been constituted out of what had previously formed part of the North-West Territories, and thereby declared a separate territory, under

the name of the Yukon Territory—"which shall be called 'The Territorial Court.' The said Court shall consist of one or more Judges, who shall be appointed by the Governor-in-Council under the Great Seal."

By s. 14.—"The Judge of the Supreme Court of the North-West Territories appointed to the Yukon District at the time this Act comes into force, and the officers of that Court for the said District, shall be the Judge and officers of the Territorial Court until otherwise provided."

At the time this Act came into force, i.e., on the 13th June, 1898, Mr. Justice McGuire, who previously had been a Judge of this Court, assigned as such Judge to the Yukon District, and the clerk and other officers of this Court for such District, thus became the Judge and officers of the Territorial Court.

This suit was, as appears from the record before us, heard and tried in the Territorial Court on the 29th July, 1898, upon pleadings closed some days previously, but on a date subsequent to 13th June, 1898.

In no part of the Yukon Act is any right of appeal given from the Territorial Court to this Court, and the question raised is whether such right of appeal exists.

The Queen v. *Taylor*, 1 S. C. R. 65; *Vansittart* v. *Taylor*, 4 E. & B. 910; *Attorney-General* v. *Sillen*, 10 H. L. C. 721, referred to.

Now this Yukon Act creates a new Court, with Judges and officers to administer justice between litigants; nowhere in it is to be found any recognition whatever of this Court as an institution whose aid and interposition may of right be invoked to redress errors of the Territorial Court.

Consequently, the conclusion is irresistibly arrived at that jurisdiction to hear the appeal now presented is absent, and therefore the appeal must be quashed, and with costs.

INDEX-DIGEST OF CASES

NOTED, DIGESTED, AND REPORTED IN THIS VOLUME.

AND ALSO OF THE CASES PUBLISHED DURING 1898 IN THE OFFICIAL REPORTS OF THE SUPREME AND EXCHEQUER COURTS OF CANADA, AND OF THE PROVINCES OF ONTARIO, NOVA SCOTIA, NEW BRUNSWICK, MANITOBA, AND BRITISH COLUMBIA.

NOTE:—Where the number of a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1898.

Occ. N.—*Canadian Law Times Occasional Notes.*
S. C. R.—*Supreme Court (of Canada) Reports.*
Ex. C. R.—*Exchequer Court (of Canada) Reports.*
A. R.—*Ontario Appeal Reports.*
O. R.—*Ontario Reports.*
P. R.—*Ontario Practice Reports.*
N. S. Reps.—*Nova Scotia Supreme Court Reports.*
N. B. Reps.—*New Brunswick Supreme Court Reports.*
N. B. Eq. Reps.—*New Brunswick Equity Reports.*
Man. L. R.—*Manitoba Law Reports.*
Brit. Col. L. R.—*British Columbia Law Reports.*

ABANDONMENT.

See Appeal, 13—County Courts, 1—Insurance, 24—Landlord and Tenant, 6—Mines and Minerals, 5—Trusts and Trustees, 1.

ABATEMENT.

See Will, 13.

ABSCONDING DEBTOR.

Attachment—"Goods, credits, effects, and choses in action"—Interest in estate under will—Equitable interest in mortgage—Liability to attachment—Equitable execution—Receiver—Priorities—Collateral attack by receiver on attachment proceedings:

Hart v. *Cunningham*, 267.

ABSENCE BEYOND SEAS.

See Bills of Exchange and Promissory Notes, 6.

ABUSIVE LANGUAGE.

See Justice of the Peace—Summary Conviction, 8.

ACCELERATION OF RENT.

See Bankruptcy and Insolvency, 14.

ACCEPTANCE OF SERVICE.

See Solicitor, 3.

ACCESSORY.

See Criminal Law, 28.

ACCIDENT.

See Master and Servant, 1, 2, 3, 8-12—Municipal Corporations, 23-32, 34-37, 40, 42—Negligence, 1, 3, 4—Railways and Railway Companies, 7-11, 13.

ACCORD AND SATISFACTION.

See Contract, 4.

ACCOUNT.

Master's office—Verification — Affidavit — Vouchers — Cross-examination—Notice—Re-opening account:

In re Curry, Curry v. *Curry*, 235; 25 A. R. 267.

See Amendment, 5—Bankruptcy and Insolvency, 9—Executors and Administrators, 4—Improvements on Land—Mortgage, 2, 10—Principal and Surety, 1—Prohibition, 1, 6, 9—Ship, 1—Solicitor, 11—Trusts and Trustees, 1.

ACKNOWLEDGMENT.

See Easement, 2.

ACQUIESCENCE.

See Executors and Administrators, 4—Landlord and Tenant, 2—Municipal Corporations, 13—Prohibition, 12—Water and Watercourses, 5—Way, 2.

ACTION.

1. Assault—Criminal prosecution—Complaint not preferred by person aggrieved—Civil remedy—Bar:

Miller v. *Lea*, 391; 25 A. R. 428.

2. Dismissal—Abuse of process of Court—Action for maliciously registering a *lis pendens*—Pleading—Amendment:

Cowan v. *Macaulay*, 5 Brit. Col. L. R. 495.

3. Dismissal—Want of prosecution—Notice of intention to proceed—Necessity for:

McIsaac v. *Broad Cove Coal Co. and McKay*, 267; 31 N. S. Reps. 108.

4. Jurisdiction of Ontario Courts—Injury to land in another province—Damage by fire—Injury to chattels—Local or transitory action:

Brereton v. *Canadian Pacific R. W. Co.*, 63; 29 O. R. 57.

ACTION—*Continued.*

5. Right to continue—Assignment of interest *pendente lite*:
Roper v. *Hopkins*, 325; 29 O. R. 580.

See Appeal, 2—Municipal Corporations, 16—Seduction.

ADJOURNMENT.

See Canada Temperance Act, 4—Criminal Law, 24—Justice of the Peace, 1—Vacation.

ADMINISTRATION.

1. Application for order—Legacy unpaid—Sale of property—Discretion of executors—Exercise of trust — Interference with:
In re O'Connor—O'Connor v. *Fahey*, 372.

2. Summary order for—Place of reference—Security for costs:
In re Armstrong—Armstrong v. *Armstrong*, 80; 18 P. R. 55.

See Dower, 2—Parties, 7—Receiver, 1.

ADMINISTRATOR.

See Executors and Administrators.

ADMINISTRATOR AD LITEM.

See Receiver, 1.

ADMISSIONS.

See Criminal Law, 8, 31—Discovery, 13.

ADULTERY.

See Husband and Wife, 1.

ADVANCEMENT.

See Distribution of Estates.

ADVERSE POSSESSION.

See Trespass to Land, 1.

ADVERTISEMENT.

See Bankruptcy and Insolvency, 23—Receiver, 1—Trade-Mark.

ADVOCATE.

1. Motion to strike names off roll—Non-payment of moneys collected—Proof of non-payment—Grounds of application—Omission to state in summons—Special provisions of Ordinance respecting legal profession—*Locus standi* of applicants—Want of privity—Employment of advocates as agents—Misconduct of one partner—Liability of the other to disciplinary jurisdiction — Punishment — Procedure—Order for payment over—*Locus poenitentiae*:
In re Advocates, 159.

ADVOCATE—*Continued.*

2. Restoration to roll—Jurisdiction of Court—Previous application—Re-enrolment — Forum — Ordinance No. 4, 1897 — Power to restore—Exercise—Discretion:

In re Forbes, 155.

AFFIDAVIT.

Sworn before *ante litem* solicitor of party to suit:

Dunsmuir v. *Klondike and Columbian Gold Fields, Ltd.*, 6 Brit. Col. L. R. 200.

See Account—Appeal, 30, 36—Arrest, 1-4, 6, 14—Assessment and Taxes, 3—Bankruptcy and Insolvency, 3—Bills of Sale, 2, 6—Certiorari, 1, 5—Company, 9, 17, 18—Costs, 29—Discovery, 7, 12, 13—Evidence, 4—Judgment, 11, 14—Liquor License Act, 3—Mechanics' Liens, 1—Order of Court—Parliamentary Elections, 3, 4—Particulars, 1—Prohibition, 10—Replevin—Service of Papers, 1.

ALIEN.

See Parliamentary Elections, 4.

ALIENATION OF AFFECTIONS.

See Husband and Wife, 1.

ALIMONY.

1. Interim allowance—Consent judgment in former action—Payment—Separation deed—Change of circumstances:

Lafrance v. *Lafrance*, 87; 18 P. R. 62.

2. Statutory provision for registration of decree—Application to previously existing decree:

Foulds v. *Foulds*, 384.

See Judgment, 5.

AMENDMENT.

1. Order for judgment upon consent—Power of trial Judge to amend—Correction of error—Remedy of party dissatisfied with order as amended—Appeal — Prothonotary—Duties of—Ministerial:

McDougald v. *Mullins*, 30 N. S. Reps. 313.

2. Order of reference—Exchequer Court of Canada—Application to amend after final judgment:

Woodburn v. *The Queen*, 166; 6 Ex. C. R. 69.

3. Pleading—Action by assignee of debt—Failure to allege assignment in writing—Amendment at trial—Costs:

Dempster v. *Fairbanks*, 29 N. S. Reps. 456.

AMENDMENT—*Continued.*

4. Pleading—Conversion of goods—Claim limited to goods actually sold—Application to amend at trial by adding a claim as to other goods:

Light v. *Hawley*, 16; 29 O. R. 25.

5. Pleading—Trial — Partnership — Conspiracy — Account—Parties—Terms—Costs:

Smith v. *Boyd*, 107; 18 P. R. 76.

See Action, 2—Bastard—Bills of Sale and Chattel Mortgages, 6—Canada Temperance Act, 2—Costs, 1—Criminal Law, 20—Master and Servant, 4—Mines and Minerals, 9—Parliamentary Elections, 3—Parties, 5, 6—Pleading, 3, 9, 10, 14, 16, 19—Statutes, 1, 2, 3—Summary Conviction, 3—Way, 4—Writ of Summons, 3.

AMOUNT IN CONTROVERSY.

See Appeal, 13, 15, 33-37, 48—Costs, 22, 25—Division Courts, 5, 6—Prohibition, 1, 6, 11.

ANIMALS.

See Criminal Law, 34—Damages, 7—Summary Conviction, 10.

ANNUITY.

See Prohibition, 9.

APPEAL.

1. Consent order—Denial of consent—R. S. O. c. 51, s. 72:

In re Solicitor, 224, 261; 17 P. R. 125.

2. Dismissal for want of prosecution—Motion to dismiss—Notice of motion—Time—Filing affidavits—Costs of application—Costs of appeal:

Knauth Nachod v. *Sterne*, 30 N. S. Reps. 295.

3. From award—Railways — Expropriation of lands — Forum—High Court—Court of Appeal—51 V. c. 29, s. 161 (D.):

In re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 128; 25 A. R. 88.

4. From award under Railway Act—Proper forum—Single Judge in Court—Transfer to proper Court—Rule 784:

In re Montreal and Ottawa R. W. Co. and Ogilvie, 219; 18 P. R. 120.

5. From taxation of costs of Court of Appeal—Forum for hearing appeal—High Court:

Holmes v. *Bready*, 111; 18 P. R. 79.

6. Leave—Necessity for—Appeal by receiver—Costs:

O'Brien v. *Christie*, 30 N. S. Reps. 145.

APPEAL—*Continued.*

7. Leave—When refused—Consideration of reasons in Court below:

Tate v. *Natural Gas and Oil Co. of Ontario*, 167; 18 P. R. 82.

8. Motion to quash—Preliminary objection—Waiver—Absence of notice—Failure to take objection at outset:

Macdonald v. *Trustees of Pandora Methodist Church*, 5 Brit. Col. L. R. 521.

9. To British Columbia full Court—Omission to set down in time—Irregularity—Leave to set down:

Cowan v. *Macaulay*, 5 Brit. Col. L. R. 495.

10. To British Columbia full Court—Order made on summons served, no one appearing, not an *ex parte* order:

Biggar v. *City of Victoria*, 6 Brit. Col. L. R. 130.

11. To British Columbia full Court—Time—Non-entry of formal judgment—Extension of time—Grounds—Refusal to extend—Subsequent fresh appeal after new right of appeal given by statute—Quashing—*Res judicata*:

Koksilah Quarry Co. v. *The Queen*, 5 Brit. Col. L. R. 600.

12. To British Columbia Judge of Supreme Court—From decision of Court of Revision:

In re Smith Assessment Appeal, 6 Brit. Col. L. R. 154.

13. To Manitoba Court of Queen's Bench—Acting on order appealed against—Abandonment of order—Amount in controversy—Writ of attachment:

Hutchinson v. *Colby*, 346; 12 Man. L. R. 307.

14. To Manitoba Court of Queen's Bench—Entry—Time—Pronouncing or entry of judgment—Rule 646:

Graham v. *British Canadian L. & I. Co.*, 187.

15. To Manitoba Court of Queen's Bench—From judgment of County Court—Amount in question—Jurisdiction:

Douglas v. *Parker*, 202; 12 Man. L. R. 152.

16. To Manitoba Court of Queen's Bench—From judgment of County Court—Motion to strike out appeal—Non-compliance with statutory requirements — Excuse—Leave to appeal—Terms—Payment of costs:

Abell v. *Craig*, 90; 12 Man. L. R. 81.

17. To North-West Territories Supreme Court—From Yukon Territorial Court—Action begun before separation of territory—Effect of statute on pending action:

Flaschaert v. *Kleinschmidt*, 427.

APPEAL—*Continued.*

18. To Nova Scotia Full Court—From findings of trial Judge—Interpleader—Evidence taken before commissioner—Weight to be attached to findings of trial Judge in such case—Interference on appeal:

Malzard v. *Hart*, 29 N. S. Reps. 431; 27 S. C. R. 510.

19. To Nova Scotia full Court—From finding of trial Judge—Non-interference—Evidence—Burden of proof:

Holloway v. *Lindberg*, 29 N. S. Reps. 460.

20. To Nova Scotia full Court—Question of fact—Contradictory evidence—Action for conversion of hay—Duty of appellate Court:

Guild v. *Dodd*, 31 N. S. Reps. 193.

21. To Ontario Court of Appeal—Application by executor under Rule 938 (*a*)—Construction of will—Appeal to Divisional Court—Further appeal—Leave—Interest of executor—Reimbursement of costs—Security for costs—Status of appellants—Contending beneficiaries:

In re Sherlock, 2; 18 P. R. 6.

22. To Ontario Court of Appeal—From report of drainage referee—Drainage Act, 57 V. c. 56, s. 106—Rules applicable to High Court appeals—Time—Vacation—Motion to confirm proceedings—Costs:

In re Township of Raleigh and Township of Harwich, 78; 18 P. R. 73.

23. To Ontario Court of Appeal—Leave to appeal—Making out case—R. S. O. 1897 c. 51, s. 77, s.-s. 4:

Patterson v. *Central Canada L. & S. Co.*, 111.

24. To Ontario Court of Appeal—Printed case—When ordered—Rule 802—Terms:

Teetzel v. *Dominion Construction Co.*, 1; 18 P. R. 16.

25. To Ontario Court of Appeal—From a Divisional Court—Hearing by consent—Further appeal—Leave:

Payne v. *Caughell*, 17 Occ. N. 413; 24 A. R. 556.

26. To Ontario Divisional Court—Issue as to satisfaction of judgment—Trial in Chambers—Right of appeal—Prohibition—Application for—Forum—Chambers:

Johnston v. *Galbraith*, 58.

27. To Ontario Divisional Court—From Division Court—Setting down—Time—Extension of—Powers of High Court:

Owen v. *Sprung*, 17 Occ. N. 370; 28 O. R. 607.

APPEAL—*Continued.*

28. To Ontario Divisional Court—From order of County Court—Interpleader order—Finality of—County Courts Act, R. S. O. 1897 c. 55, s. 52 (1)—Construction of:
Hunter v. *Hunter*, 114.

29. To Ontario Divisional Court—From order of County Court in term—Reversal of verdict—Jurisdiction of County Court in term—Rule 615:
Donaldson v. *Wherry*, 306; 29 O. R. 552.

30. To Ontario Divisional Court—From Surrogate Court—Notice—Affidavit—Security:
In re Eastman, 379.

31. To Ontario Divisional Court—Waiver—Action on judgment—Quashing appeal—Costs:
Videan v. *Westover*, 83; 29 O. R. 1.

32. To Ontario High Court of Justice—From Master's report—Notice of filing—Service—Rule 769—Time for appeal:
In re Supreme Legion Select Knights of Canada—Cunningham's Case, 380; 29 O. R. 708.

33. To Privy Council — Leave — Amount in controversy—"Civil right:"
Madden v. *Nelson and Fort Sheppard R. W. Co.*, 5 Brit. Col. L. R. 670.

34. To Supreme Court of Canada—Amount in controversy—Dismissal on the merits where jurisdiction doubtful:
Bain v. *Anderson*, 284; 28 S. C. R. 481.

35. To Supreme Court of Canada — Amount in controversy—Monthly allowance—Future rights—"Other matters and things"—R. S. C. c. 135, s. 29 (*b*)—56 V. c. 29—Established jurisprudence in Court below:
Macdonald v. *Galivan*, 213; 28 S. C. R. 258.

36. To Supreme Court of Canada—Amount in controversy—Motion to quash—Costs—Jurisdiction appearing by affidavit:
Auer Incandescent Light Mfg. Co. v. *Dreschel*, 209; 28 S. C. R. 226.

37. To Supreme Court of Canada — Amount in controversy — *Opposition afin de distraire* — Judicial proceeding — Demand in original action—R. S. C. c. 135, s. 29:
King v. *Dupuis*, 301; 28 S. C. R. 388.

38. To Supreme Court of Canada—Appeal for costs—Consolidation of suits—Discretion of Courts appealed from:
Smith v. *St. John City R. W. Co.*; *Consolidated Electric Co.* v. *Atlantic Trust Co.*; *Consolidated Electric Co.* v. *Pratt*, 28 S. C. R. 603.

APPEAL—*Continued.*

39. To Supreme Court of Canada—Assessment cases—Court for hearing — Persons presiding — Appointment of — Board of County Court Judges—Final judgment:

City of Toronto v. *Toronto R. W. Co.*, 17 Occ. N. 389; 27 S. C. R. 640.

40. To Supreme Court of Canada—Final judgment—Application to set aside judgment by default and to be let in to defend—Discretionary order—R. S. C. c. 135, s. 27—Appeal quashed:

Bourne v. *O'Donohoe*, 17 Occ. N. 390; 27 S. C. R. 654.

41. To Supreme Court of Canada—Findings of Court below—Negligence—Duty of appellate Court:

Bouchard v. *George Matthews Co.*, 28 S. C. R. 580.

42. To Supreme Court of Canada—From judgment of Exchequer Court—Extension of time—Amendment of order of reference:

Woodburn v. *The Queen*, 166; 6 Ex. C. R. 69.

43. To Supreme Court of Canada—From judgment setting aside award—Principle of decision—Duty of appellate Court:

Grand Trunk R. W. Co. v. *Coupal*, 334; 28 S. C. R. 531.

44. To Supreme Court of Canada—From order for new trial of criminal cause — Criminal Code, 1892, ss. 742-750—"Opinion:"

Viau v. *The Queen*, 352.

45. To Supreme Court of Canada—From Superior Court in Review, Quebec—Direct appeal:

Simpson v. *Palliser*, 351.

46. To Supreme Court of Canada—Future rights — Alimentary pensions:

Banque du Peuple v. *Trottier*, 28 S. C. R. 422.

47. To Supreme Court of Canada—Leave to appeal—Matter of public importance—Life insurance—Construction of conditions—Interpretation of statute—60 & 61 V. c. 34, s. 1:

Fisher v. *Fisher*, 28 S. C. R. 494.

48. To Supreme Court of Canada—Limitation of right of appeal—Amount in controversy—60 & 61 V. c. 34—Application to pending cases:

Hyde v. *Lindsay*, 373.

49. To Supreme Court of Canada—Matter in controversy—Interest of second mortgagee—Surplus on sale of mortgaged lands—60 & 61 V. c. 34:

Tew v. *Neill*, 333; *Jermyn* v. *Tew*, 28 S. C. R. 497.

APPEAL—*Continued.*

50. To Supreme Court of Canada—Prohibition—Quebec law:

Shannon v. *Montreal Park and Island R. W. Co.*, 28 S. C. R. 374.

51. To Supreme Court of Canada—Reversal of judgment on questions of fact—Error in admission or appreciation of evidence:

Lefeunteun v. *Beaudoin*, 103; 28 S. C. R. 89.

52. To Supreme Court of Canada—Stated case—Judgment of Provincial Court on reference by Lieutenant-Governor for an opinion—54 V. c. 5 (B. C.)—Jurisdiction—Appeal quashed:

Union Colliery Co. v. *Attorney-General for British Columbia*, 17 Occ. N. 391; 27 S. C. R. 637.

53. To Supreme Court of Canada—Title to land—Petitory action—Encroachment—Boundaries:

Delorme v. *Cusson*, 103; 28 S. C. R. 66.

See Amendment, 1—Arbitration and Award, 2, 3—Assessment and Taxes, 9—Certiorari, 3—Company, 11—Costs, 2-7, 16, 18, 21, 25, 26, 35, 42, 43—County Courts, 3—Division Courts, 2, 6—Equitable Execution, 1—Evidence, 2, 4, 10—Exchequer Court of Canada, 2—Executors and Administrators, 1—Injunction, 2—Judgment, 2, 4, 14—Liquor License Act, 2—Master and Servant, 5, 11—Mortgage, 2—Municipal Corporations, 1, 11, 19—New Trial, 4—Parties, 11—Partnership, 2—Pleading, 14—Probate Courts, 1—Prohibition, 3, 5—Railways and Railway Companies, 2, 4—Real Property Act—Schools, 1—Statutes, 13—Surrogate Courts, 2—Trial, 8, 9—Trusts and Trustees, 1—Venue, 3—Way, 2.

APPEARANCE.

See Writ of Summons, 1.

APPORTIONMENT.

See Costs, 4—Insurance, 8, 15, 17—Principal and Surety, 4—Railways and Railway Companies, 5—Solicitor, 10.

APPROPRIATION OF PAYMENTS.

See Crown, 3.

APPURTENANCES.

See Deed, 5.

ARBITRATION AND AWARD.

1. Action to enforce award—Publication—Meaning of—Time for moving against award—Interest—Costs of arbitration—Taxation—Judgment — Writ of summons — Special indorsement:

Huyck v. *Wilson*, 66; 18 P. R. 44.

2. Appeal from award—Principle of decision—Expropriation of land—Prospective capabilities—Evidence of arbitrator—Admissibility:

Ex p. Gilbert, 17 Occ. N. 342; 1 N. B. Eq. Reps. 432.

3. Arbitrator—Refusal to state case—Application to Court to compel him to do so—Judicial discretion—Appeal:

In re Jenison and Kakabeka Falls Land and Electric Co., 396; 25 A. R. 361.

4. Arbitrator selected by the parties—Order of reference made by consent—Setting aside award for misconduct of arbitrator—Power to refer back—R. S. O. c. 62, ss. 12, 35, 42—Rule 652:

Kennedy v. *Beal*, 288; 29 O. R. 599.

5. Motion to stay proceedings in action on contract—Provision for arbitration—Alleged bias of arbitrator—R. S. O. c. 62, s. 6:

Sherwood v. *Balch*, 406.

See Appeal, 3, 4, 43—Bankruptcy and Insolvency, 3—Constitutional Law, 1, 7—Costs, 38—Crown, 4—Ditches and Watercourses—Municipal Corporations, 1, 2, 3, 16, 19, 43—Railways and Railway Companies, 2, 3, 4—Schools, 1, 3.

ARBITRATOR.

See Arbitration and Award, 3, 4, 5.

ARREST.

1. Affidavit to hold to bail—Cause of action—Price of mining property sold—Insufficient statement — Jurisdiction—Order under seal of Court—Defect in affidavit—Taking advantage of—Time:

Weatherbe v. *Whitney*, 30 N. S. Reps. 104.

2. Affidavit to hold to bail—Insufficiency of—Action for breach of promise of marriage—Failure to shew particulars of contract and breach:

Craven v. *Williamson*, 31 N. S. Reps. 256.

ARREST—*Continued.*

3. Affidavit to hold to bail—Statement of cause of action—Uncertainty as to amount due—Service of copy of order for *ca. re.*—Necessity for—Service of affidavits on which *ex parte* order obtained—Non-cancellation of law stamps on process—Address of defendant — Variation between writ and affidavit—Alien defendant — Cause of action arising in foreign country—Law of foreign country—Presumption as to—Intent to defraud creditors—Necessity for shewing:

   Macaulay v. *O'Brien*, 5 Brit. Col. L. R. 510.

4. Affidavit to hold to bail—Variance from words of statute—Goods bargained and sold:

   Carling Brewing and Malting Co. v. *Fairweather*, 313.

5. Attachment for non-payment of costs incurred in Supreme Court of Canada:

   Bank of Nova Scotia v. *Fish*, 33 N. B. Reps. 604.

6. Capias—Affidavit to hold to bail—Sufficiency of—Justice of the peace—Action for false arrest and trespass—Malice—Question for jury—Reasonable and probable cause—Discretion of trial Judge:

   Orwitz v. *McKay*, 31 N. S. Reps. 243.

7. Capias—Defect—City Civil Court—Omission to shew territorial jurisdiction:

   Gabriels v. *Ward*, 71.

8. *Ca re.*—Motion to discharge prisoner—Practice—Notice of motion—Intention to quit Province—Passage through foreign country:

   Coursier v. *Madden*, 6 Brit. Col. L. R. 125.

9. *Ca sa.*—Discharge of debtor in custody—Indigent Debtors' Act:

   Gossling v. *McBride*, 4; 17 P. R. 585.

10. Discharge—Failure to deliver statement of claim—Rule 1044—Extension of time—Rule 353—Terms:

    Winch v. *Travis*, 143; 18 P. R. 102.

11. Discharge—Order for—Property not liable to be taken in execution—Equity of redemption in chattels—Conditional order for discharge:

    Ex p. Miller—In re Miller v. *Smith*, 34 N. B. Reps. 5.

12. Discharge—Signing as to truth of answer—Evidence that defendant in custody:

    Ex p. Heywood—In re Heywood v. *Perry*, 34 N. B. Reps. 8.

ARREST—*Continued.*

13. Disobedience to Chambers order for payment of money to a receiver—Collection Act, 1894—Order for payment of money—Refusal to order attachment—Costs of motion to commit where order not opposed:

Commercial Bank of Windsor v. *Scott*, 30 N. B. Reps. 401.

14. Order for—Motion to set aside—Vendor's action for price of mining areas—Breach of contract for sale—Remedy in damages only—Affidavit to hold to bail—Sufficiency of:

Weatherbe v. *Whitney*, 30 N. S. Reps. 447.

15. School rates—Collection of—Arrest of defaulter—Statutes—Public Instruction Act—Incorporation of provisions of Municipal Assessment Act—Amendments to—Action for false imprisonment against school officer—Non-liability—Justice of the peace—Constable—New trial:

McKenzie v. *Jackson*, 31 N. S. Reps. 70.

See Criminal Law, 1, 19—Trespass to Person.

ASSAULT.

See Action, 1—Criminal Law, 2, 3, 6, 27, 33—Evidence, 1—Street Railways, 2.

ASSESSMENT AND TAXES.

1. Appeal from decision of Court of Revision—Assessor—Right to appeal to County Court Judge—Prohibition:

In re British Mortgage Loan Co., 338; 29 O. R. 598.

2. By-law to exempt from municipal taxes—Liability for school taxes—Right of municipality to sue:

City of Winnipeg v. *Canadian Pacific R. W. Co.*, 370.

3. Collector's return to treasurer of unpaid taxes—Return to clerk—Necessity for—Collector's affidavit—R. S. O. 1887 c. 193, ss. 135, 136:

Caston v. *City of Toronto*, 402.

4. Lien for taxes—Discharge of, by tax sale—Release—Municipal Act, B.C., 1892, s. 104, s.-s. 115:

Jamieson v. *City of Victoria*, 6 Brit. Col. L. R. 109.

5. Life insurance company—Reserve fund—Income—Divisible profits:

In re Canada Life Assurance Co. and City of Hamilton, 287; 25 A. R. 312.

6. Payment of taxes by mortgagees—Invalidity of mortgage—Lien for amount paid:

Graham v. *British Canadian L. & I. Co.*, 34, 315; 12 Man. L. R. 244.

ASSESSMENT AND TAXES—*Continued.*

7. Quashing assessment —*Certiorari*—Non-payment by assessor of previous year's rates—*De facto* officer—C. S. N. B. c. 99, s. 69:

Ex p. Martin, 34 N. B. Reps. 142.

8. Sale of land for taxes—Expropriation of land before expiry of period of redemption—Who entitled to compensation money:

In re Dunn, 91; 12 Man. L. R. 78.

9. Streets vested in private owner—Assessment at real value to owner—Appeal from Court of Revision:

In re Smith Assessment Appeal, 6 Brit. Col. L. R. 154.

10. Telephone company—Poles, wires, conduits, and cables—Valuation of:

In re Bell Telephone Co. and City of Hamilton, 287; 25 A. R. 351.

11. Toronto Railway Company—Rails, poles, and wires—Highways—Street railways:

In re Toronto R. W. Co. Assessment, 131; 25 A. R. 135.

12. Vacant tenement—Remission of taxes—Petition—Court of Revision—55 V. c. 48, s. 67—Mandamus:

In re Norris, 17 Occ. N. 420; 28 O. R. 636.

See Appeal, 39—Arrest, 15—Executors and Administrators, 3—Municipal Corporations, 15, 17, 33—Prohibition, 3—Sale of Land, 2.

ASSESSMENT OF DAMAGES.

See Damages, 1—Judgment, 1, 13.

ASSIGNMENT.

For Benefit of Creditors—See Bankruptcy and Insolvency, 2-9—Landlord and Tenant, 3—Principal and Agent, 5—Prohibition, 8.

Of Annuity—See Prohibition, 9.

" Certificate—See Insurance, 10.

" Chattel Mortgage—See Bills of Sale and Chattel Mortgages, 5.

" Chose in Action—See Chose in Action, 1, 2—Contract, 11.

" Covenant—See Prohibition, 11.

" Debt—See Parties, 6.

" Equitable Right—See Mortgage, 8, 13.

" License—See Crown Lands, 3.

" Policy—Insurance, 3, 9, 22.

ASSIGNMENTS AND PREFERENCES.

See Bankruptcy and Insolvency—Prohibition, 8.

ATTACHMENT.

See Absconding Debtor—Arrest, 5, 13—Receiver, 3.

ATTACHMENT OF DEBTS.

1. Election deposit attached in the hands of returning officer by creditor of candidate—Money lent to candidate for purposes of deposit:

   Ex p. Peck, 33 N. B. Reps. 623.

2. Exemptions—Wages—Salary of deputy sheriff and gaoler—Estoppel—Costs—Taxation—*Certiorari*:

   Ex p. Bowes—Municipality of Westmorland, garnishee, 34 N. B. Reps. 76.

See Division Courts, 3—Equitable Execution, 2—Fraudulent Conveyance, 2—Prohibition, 10.

ATTORNEY.

See Pleading, 9.

AUCTIONEER.

See Municipal Corporations, 6.

AUDIT.

See Principal and Surety, 1.

AWARD.

See Arbitration and Award.

BAIL.

See Criminal Law, 1, 21.

BAILIFF.

See Criminal Law, 18—Distress—Landlord and Tenant, 7.

BAILMENT.

Storage of wheat in elevator—Bailment or sale—Statute of Frauds:

Lawlor v. *Nicol*, 318; 12 Man. L. R. 224.

See Contract, 5, 15.

BALLOTS.

See Canada Temperance Act, 6—Parliamentary Elections, 1, 5-7.

BANKRUPTCY AND INSOLVENCY.

1. Advances by bank to insolvent—Pledge of goods as security—Invalidity of—Bank Act—Claim by creditor to recover from bank moneys arising from sale of goods—58 V. c. 23, s. 1 (O.)—"Invalid against creditors"—Retroactivity of statute—Warehouse receipts—Exchange of securities—53 V. c. 31, s. 75, s.-s. 2 (D.)—Collateral security—Mortgage—Declaration—Parties:

Conn v. *Smith*, 17 Occ. N. 422; 28 O. R. 629.

2. Assignee for benefit of creditors—Action brought in name of—Statute of Frauds, s. 4:

Clarke v. *Webber*, 314.

3. Assignment for benefit of creditors—Affidavit of *bona fides*—Preferences—Distribution of assets—Arbitration—Conditions of deed—13 Eliz. c. 5:

Maguire v. *Hart*, 28 S. C. R. 272.

4. Assignment for benefit of creditors—Partnership—Construction of deed of assignment—Creditors of partnership—Creditors of individual partners—Preference of one class—Voluntary conveyance — Defeating creditors — Setting aside—Absence of fraud—Burden of proof:

Cunningham v. *Curtis*, 5 Brit. Col. L. R. 472.

5. Assignment for benefit of creditors—Examination of clerk or servant of insolvent—R. S. O. c. 147, s. 34—Servant of firm of which insolvent a member:

In re Guinane, 341; 18 P. R. 208.

6. Assignment for benefit of creditors—Landlord and tenant—Unlimited claim — Damages for overholding — Double value—4 Geo. II. c. 28, s. 1—Right to rank on estate—Preferential claim—Rent:

Magann v. *Ferguson*, 137; 29 O. R. 235.

7. Assignment for benefit of creditors—Lien of first execution creditor for costs—Loss of lien—Ranking on estate—Action against assignee:

Gillard v. *Milligan*, 17 Occ. N. 376; 28 O. R. 645.

8. Assignment for benefit of creditors—Preferential assignment—Void against sheriff seizing under execution—Badges of fraud—Incompetent assignee—Discretion as to purchase of additional stock—Control retained by assignors—Small value of goods assigned:

Culton v. *Harris*, 30 N. S. Reps. 112.

BANKRUPTCY AND INSOLVENCY—*Continued.*

9. Assignment for benefit of creditors—Preferred creditors—Money paid under voidable assignment—Levy and sale under execution—Statute of Elizabeth—Account against assignee:

   Cummings v. *Taylor*, 278; 28 S. C. R. 337.

10. Assignment of goods and business—Fraudulent purpose—Defeating creditors—Existing debt—13 Eliz. c. 5—Sheriff—Action of replevin against:

   Mulcahy v. *Archibald*, 304, 335; 30 N. S. Reps. 121; 28 S. C. R. 523.

11. Assignments Act—Insolvent debtor—Ranking on estate—Valuing security—Party primarily liable—R. S. O. c. 147, s. 20—Construction of:

   Glanville v. *Strachan*, 221; 29 O R. 373.

12. Assigments and preferences—Fraudulent conveyance—Setting aside—Nature of evidence necessary:

   Delong v. *Gillis*, 31 N. S. Reps. 61.

13. Assignments and preferences—Fraudulent preference—Deed of land—Previous agreement—13 Eliz. c. 5—Consideration:

   McNeil v. *McPhee*, 31 N. S. Reps. 140.

14. Assignments and preferences—Landlord and tenant—Rent—Acceleration clause—58 V. c. 26, s. 3, s.-s. 1.

   Langley v. *Meir*, 287; 25 A. R. 372: *Lazier* v. *Henderson*, 358; 29 O. R. 673.

15. Assignments and preferences—Payment of money to creditor—Cheque of third party:

   Davidson v. *Fraser*, 28 S. C. R. 272.

16. Assignments and preferences — Presumption — Rebuttal — Pressure—Agreement to give security:

   Webster v. *Crickmore*, 129; 25 A. R. 97.

17. Assignments and preferences—Transfer of unearned profits—Pressure—Statute of Elizabeth—Assets eligible in execution:

   Blakeley v. *Gould*, 27 S. C. R. 682.

18. Conveyance by insolvent debtor—Preference—Impeaching—Pressure—Time—Consideration — Untrue statement in conveyance—Proof of other consideration—Burden of proof—Sheriff—Statute of Elizabeth:

   Gignac v. *Iler*, 80, 392; 29 O. R. 147; 25 A. R. 393.

BANKRUPTCY AND INSOLVENCY—*Continued.*

19. Fraudulent preference—Breach of trust—Revocation of transfer of cheque—Post Office Act—Assignment for benefit of creditors:

Holwell v. *Township of Wilmot*, 17 Occ. N. 395; 24 A. R. 628.

20. Fraudulent preference — Chattel mortgage — Advances of money—Solicitor's knowledge of circumstances:

Burns v. *Wilson*, 28 S. C. R. 207.

21. Fraudulent preference—"Insolvent"—"Unable to pay debts in full"—Meaning of—Preferential security—Pressure:

Bertrand v. *Canadian Rubber Co.*, 17 Occ. N. 272, 427; 12 Man. L. R. 27.

22. Preferential assignment of security by insolvent—Attack by creditor—Right of attacked creditor to share in proceeds:

Barber v. *Crathern*, 18; 28 O. R. 615.

23. Right to prove on insolvent estate—R. S. O. 1887 c. 124, s. 20, s.-s. 4—Claim "not accrued due"—Construction of advertising contract:

Mail Printing Co. v. *Clarkson*, 47; 25 A. R. 1.

BANKS AND BANKING.

Collateral security—R. S. C. c. 120, Schedule "C"—53 V. c. 33, ss. 74, 75—Bills and notes—Renewals—Assignments:

Halstead v. *Bank of Hamilton*, 210; 28 S. C. R. 235.

See Bankruptcy and Insolvency, 1—Contempt of Court—Tender.

BARRISTER

See Advocate.

BASTARD.

Liability for maintenance of—Overseers of the poor—Settlement of mother in district—Statutory liability—Absence of express agreement between the plaintiff and overseers—Amendment—Costs—Notice:

Carter v. *Overseers of the Poor of the District of Brookfield*, 30 N. S. Reps. 225.

See Prohibition, 2.

BENEFIT SOCIETIES.

1. Alteration in rules—Reduction in amount of sick benefits:

Baker v. *Forest City Lodge, I. O. O. F., Parkhouse* v. *Dominion Lodge, I. O. O. F.*, 17 Occ. N. 393; 24 A. R. 585.

BENEFIT SOCIETIES—*Continued.*

2. Rules—Construction—Suspension of payment:

Miller v. *Hamilton Police Benefit Fund*, 283; 28 S. C. R. 475.

3. Rules—Construction—Total disability benefit—Repeal of provisions as to—Asseessments—Non-payment—Suspension —"Fixed dates"—Time—Notice:

In re Supreme Legion Select Knights of Canada—Cunningham's Case, 380; 29 O. R. 708.

See Insurance, 10-18.

BEQUEST.

See Will.

BIAS.

See Arbitration and Award, 5—Justice of the Peace, 2, 3, 4—Liquor License Act, 1, 3—Police Magistrate, 1.

BILL OF COMPLAINT.

See Pleading, 4.

BILL OF LADING.

See Maritime Law, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Cheque—Presentation—Pleading:

Knauth Nachod v. *Stern*, 30 N. S. Reps. 251.

2. Promissory note—Consideration — Forbearance to sue on former note—Evidence:

McGregor v. *McKenzie*, 30 N. S. Reps. 214.

3. Promissory note—Indorsement of note containing blanks, afterwards filled up by maker—Authority—Estoppel—Liability of indorser—Material alteration—Waiver of demand equivalent to waiver of presentment:

Burton v. *Goffin*, 5 Brit. Col. L. R. 454.

4. Promissory note—Insertion of rate of interest—Material alteration—Implied authority by reason of blank left in note —Evidence:

British Columbia Land and Investment Agency (Ltd.) v. *Ellis*, 6 Brit. Col. L. R. 82.

5. Promissory note—Material alteration—Unauthorized addition of name of person as maker—Intent—Presumption—Holder in due course—Alteration not apparent—Bills of Exchange Act, 1890, s. 63:

Cunnington v. *Peterson*, 171; 29 O. R. 346.

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

6. Promissory note payable on demand—Alteration of date—Limitation of actions—Absence beyond the seas—Return from beyond the seas:

Boulton v. *Langmuir*, 17 Occ. N. 397; 24 A. R. 618.

See Banks and Banking—Costs, 22—Judgment, 14, 15—Pleading, 15—Sale of Goods, 1—Solicitor, 8.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Bill of sale—Description of goods—Evidence as to actual ownership—Execution—Intituling—Sheriff:

McAskill v. *Power*, 30 N. S. Reps. 189.

2. Chattel mortgage—Affidavit of execution—Mortgagee acting as commissioner for taking affidavits:

Inch v. *Simon*, 34; 12 Man. L. R. 1.

3. Chattel mortgage—Omission to renew—Mortgagee taking possession—Sufficiency of—Seizure by execution creditor—57 V. c. 37, ss. 38, 40:

Heaton v. *Flood*, 7; 29 O. R. 87.

4. Chattel mortgage—Recital of amount due—Covenant to pay indefinite sum in addition to amount due—Estoppel—Express covenant:

Rithet v. *Beaven*, 5 Brit. Col. L. R. 457.

5. Chattel mortgage—Renewal statement—Assignment between making and filing—R. S. O. c. 148, s. 18:

Daniel v. *Daniel*, 290; 29 O. R. 493.

6. Chattel mortgage—Validity of—Security taken in name of trustee—Affidavit of *bona fides*—Conversion of goods—Damages—Measure of — Amendment — Adding claim—Pleading:

Light v. *Hawley*, 16; 29 O. R. 25.

See Bankruptcy and Insolvency, 20—Insurance, 1—Sale of Goods, 2.

BISHOP.

See Corporation Sole—Will, 10.

BOND.

Condition—Penalty—Maintenance—Right to sue for support—Lien on land—Enforcement—Registration:

Baker v. *Trusts and Guarantee Co.*, 264; 29 O. R. 456.

See Company, 20—Contract, 6—Judgment, 1—Landlord and Tenant, 6—Pleading, 5—Principal and Surety, 1—Replevin—Sheriff, 2.

BONUS.

See Company, 12—Mortgage, 2.

BOUNDARIES.

Title to land—Petitory action — Encroachment — Improvements under mistake of title—Good faith—Common error—Demolition of works—Right of accession—Indemnity—*Res judicata*:

Delorme v. *Cusson*, 103; 28 S. C. R. 66.

See Schools, 1.

BREACH OF PROMISE OF MARRIAGE.

See Arrest, 2.

BRITISH COLUMBIA GAME PROTECTION ACT.

See Game.

BRITISH NORTH AMERICA ACT.

See Constitutional Law.

BROKER.

See Principal and Agent, 2.

BY-LAWS.

See Assessment and Taxes, 2—Company, 6—Municipal Corporations, 5-11, 13, 15, 21, 39, 43.

CALLS.

See Company, 6, 11.

CANADA TEMPERANCE ACT.

1. Conviction—Defect in information—Defendant appearing—Jurisdiction of magistrate—*Certiorari*:

Ex p. Sonier, 34 N. B. Reps. 84.

2. Conviction—"Penalty" in s. 117—Imprisonment for longer period than authorized—No power to amend:

Reg. v. *Gavin*, 30 N. S. Reps. 162.

3. Conviction—Stipendiary magistrate—Territorial jurisdiction—Warrant of commitment—Statute defining municipalities—Judicial notice—*Habeas corpus*—Jurisdiction of Supreme Court of Canada—R. S. C. c. 135, s. 32:

Reg. v. *Macdonald* (or *Ex p. Macdonald*), 17 Occ. N. 412; 27 S. C. R. 683.

4. Justice of the peace—Adjournment—Jurisdiction:

Ex p. Card, 34 N. B. Reps. 11.

CANADA TEMPERANCE ACT—*Continued.*

5. Order for destruction of liquor—Search warrant—Conviction—Information—Variance:

Reg. v. *Dibblee—Ex p. Cavanagh*, 34 N. B. Reps. 1.

6. Repeal of—Vote upon—Scrutiny of ballots—Secondary evidence of lost or stolen ballots:

Ex p. Le Blanc, 34 N. B. Reps. 88.

7. "Sale" of intoxicating liquors—Purchase of imported liquors in customs warehouse:

Reg. v. *Morris*, 41.

See Landlord and Tenant, 12 — Police Magistrate, 1—Summary Conviction, 1.

CANALS.

See Crown, 8, 9.

CANCELLATION OF CONTRACT.

See Contract, 9—Insurance, 3, 7, 17.

CAPIAS.

See Arrest.

CARNAL KNOWLEDGE.

See Criminal Law, 11, 26, 27.

CARRIERS.

See Maritime Law, 1.

CATTLE PROTECTION ACT.

See Constitutional Law, 2.

CERTIFICATE.

See Insurance, 10-18—Sale of Goods, 6.

CERTIORARI.

1. Absence of affidavit required by statute—Objection after return of writ:

Reg. v. *Major*, 29 N. S. Reps. 373.

2. Necessity for, where conviction already before the Court:

Reg. v. *Monaghan*, 45.

3. Removal of judgment—Nullity—Appeal:

Reg. v. *Foster—In re Esson Estate*, 30 N. S. Reps. 1.

4. Resolution of municipal council—"Judicial tribunal"—Resolution as to disposal of fine and costs upon a conviction—"Judicial matter"—Review by Court:

In re Town Council of New Glasgow, 30 N. S. Reps. 107.

CERTIORARI—*Continued*,

5. Rule *nisi* for—Discharge of—Affidavits not served:

Ex p. Leighton, 33 N. B. Reps. 606.

See Assessment and Taxes, 7—Attachment of Debts, 2—Canada Temperance Act, 1—Indian—Liquor License Act, 3, 4—Probate Courts, 1—Summary Conviction, 6.

CHAMPERTY.

See Solicitor, 11.

CHARGE.

See Receiver, 5—Registry Laws, 1—Will, 15.

CHARGING ORDER.

See Solicitor, 4, 5.

CHARITABLE INSTITUTION.

See Infant, 1, 4.

CHARITIES.

See Will, 1, 6, 10, 14.

CHARTERPARTY.

See Maritime Law, 1.

CHATTEL MORTGAGE.

See Bankruptcy and Insolvency, 20—Bills of Sale and Chattel Mortgages, 2-6—Insurance, 1—Fixtures, 3.

CHEQUE.

See Bankruptcy and Insolvency, 15, 19—Bills of Exchange and Promissory Notes, 1.

CHOSE IN ACTION.

1. Assignment—Notice—Life insurance:

Crawford v. *Canada Life Assurance Co.*, 17 Occ. N. 395; 24 A. R. 643.

2. Verbal equitable assignment—Subsequent written assignment—Priorities:

Heyd v. *Millar*, 399; 29 O. R. 735.

See Contract, 11—Discovery, 2.

CHURCH.

Incumbent's salary—Liability of churchwardens—Voluntary contributions:

Daw v. *Ackerill*, 48; 25 A. R. 37.

See Nuisance.

CIVIL RIGHTS.

See Appeal, 33—Constitutional Law.

CIVIL SERVICE.

See Crown, 1, 2.

CLERK.

See Master and Servant, 7.

CLERK OF THE PEACE.

See Costs, 18.

CLOSE OF PLEADINGS.

See Notice of Trial—Particulars, 1.

CLUB.

See Liquor License Act, 5.

COLLATERAL SECURITIES.

See Bankruptcy and Insolvency, 1—Banks and Banking—Parties, 7—Pleading, 15.

COLLISION.

See Maritime Law, 2—Railways and Railway Companies, 7.

COLLUSION.

See Municipal Elections—Solicitor, 7.

COMMERCIAL AGENCY.

See Costs, 28.

COMMISSION.

See Company, 16.

COMMITTAL ORDER.

See Prohibition, 10.

COMPANY.

1. Action against—Wrongful dismissal of servant—Construction of contract—Powers of provisional directors after incorporation—Ratification:

   O'Dell v. *Boston and Nova Scotia Coal Co.*, 29 N. S. Reps. 385.

2. Action by one shareholder on behalf of all—False and fraudulent representations—Inducements to take shares—Use of name of company as plaintiffs—Necessity for—Special circumstances—Company under control of defendant—Special damage to plaintiff—Joinder of other shareholders—Right of plaintiff to recover—Nominal damages—Pleading—Costs:

   Weatherbe v. *Whitney*, 30 N. S. Reps. 49.

COMPANY—*Continued.*

3. Contract made by director—Authorization—Informality—Sale of undertaking — Purchase money — Equitable charge upon:

Allen v. *Ontario and Rainy River R. W. Co.*, 288; 29 O. R. 510.

4. Contract with trading corporation — Absence of seal — Manager's authority—Purchase in ordinary course of business:

Thompson v. *Brantford Electric, etc., Co.*, 25 A. R. 340.

5. Debentures—Retirement of—Substitution of bonds of new company—Redemption—Status of holders of redeemed bonds—Right to rank upon funds of old company:

Pratt v. *Consolidated Electric Co.—Grant's and Molsons Bank's Claims*, 34 N. B. Reps. 23.

6. Directors—By-law—*Ultra vires*—Discount shares—Calls for unpaid balances—Contributories:

North-West Electric Co. v. *Walsh*, 374.

7. Execution of lease—Corporate seal:

Palmer v. *Mail Printing Co.*, 62; 28 O. R. 656.

8. Judgment against—Execution against shareholders—Procedure —*Sci fa.*—Summary application—Order 40, Rule 23—Liability of shareholders—Incorporation of company—Special statute—General statute—"Joint stock company"—Recording of judgment:

Hamilton v. *Stewiacke Valley R. W. Co.*, 30 N. S. Reps. 10.

9. Judgment against—Execution against shareholder—Proof of subscription for shares—Signature to stock list—Affidavit —*Prima facie* case—Trial of question of fact—Order directing issue to be tried—Limited subscription—Validity—Costs:

Hamilton v. *Stewiacke, etc., R. W. Co.*, 30 N. S. Reps. 166.

10. Offence against municipal by-law—Liability to prosecution—Jurisdiction of police magistrate—Service of summons—Prohibition:

In re Reg. v. *Toronto R. W. Co.*, 412.

11. Shares—Conditional subscription—Conflicting evidence—Appeal on—Calls made by company before arrival of time fixed by charter to "commence operations:"

North Sydney Mining and Transportation Co. v. *Greener*, 31 N. S. Reps. 41.

COMPANY—*Continued.*

12. Trading corporation—Power to borrow money—Power to mortgage—Power to pay bonus—Reasonableness of amounts paid:

Farrell v. *Caribou Gold Mining Co.*, 30 N. S. Reps. 199.

13. Winding-up—Applications to Court in course of liquidation—Summons:

In re Nelson Sawmill Co., 6 Brit. Col. L. R. 156.

14. Winding-up—Appointment of liquidator—Shareholder:

In re New Westminster Gas Co., 5 Brit. Col. L. R. 618.

15. Winding-up—Moneys paid out of Court—Order made by inadvertence—Jurisdiction to compel repayment—R. S. C. c. 129, ss. 40, 41, 94—*Locus standi* of Receiver-General—55 & 56 V. c. 28, s. 2—Construction of :

In re Central Bank of Canada—Hogaboom's Case, 212; 28 S. C. R. 192.

16. Winding-up—Notice of motion for discharge of liquidator—Commission—Powers of Judge in Chambers:

In re McDougall Distillery Co., 421.

17. Winding-up—Petition—Affidavit verifying—Necessity for—Information and belief—Petitioning creditor—Debt not payable—Estoppel:

In re Atlas Canning Co., 5 Brit. Col. L. R. 661.

18. Winding-up—Petition for—Practice—Affidavit:

In re Kootenay Brewing, Malting, and Distilling Co., 28 S. C. R. 112.

19.—Winding-up—R. S. C. c. 129—Petition—Chambers:

In re Toronto Brass Co., 413; 18 P. R. 248.

20. Winding-up order—Proof of assets—Unpaid stock—Stock issued as paid up—Bonds:

In re Georgian Bay Ship Canal and Power Aqueduct Co., 223; 29 O. R. 358.

See Benefit Societies—Constitutional Law, 4—Discovery, 1-4, 12—Execution, 4—Judgment Debtor—Landlord and Tenant, 10—Parties, 5—Principal and Agent, 1—Railways and Railway Companies.

COMPENSATION.

See Executors and Administrators, 2—Lis Pendens—Municipal Corporations, 2, 22—Solicitor, 11—Statutes, 3—Will, 2.

CONDITIONS.

See Bond—Contract, 4—Insurance, 1, 2, 4, 7, 27—Maritime Law, 1—Mines and Minerals, 19—Sale of Goods, 7.

CONDITIONAL LEAVE TO DEFEND.

See Judgment, 14, 15, 16.

CONDITIONAL SALE.

See Sale of Goods, 1, 2, 4.

CONFLICT OF LAWS.

See Crown, 3.

CONSENT.

See Appeal, 25—Criminal Law, 12—Devolution of Estates Act, 2—Division Courts, 4.

CONSENT JUDGMENT.

See Alimony, 1—Costs, 11, 20.

CONSENT ORDER.

See Appeal, 1—Costs, 39.

CONSIDERATION.

See Bills of Exchange and Promissory Notes, 2—Contract, 2, 7, 16, 19—Fraudulent Conveyance, 1—Insurance, 10—Landlord and Tenant, 4—Parent and Child—Registry Laws, 2—Writ of Summons, 3.

CONSOLIDATION OF ACTIONS.

See Appeal, 38.

CONSPIRACY.

See Amendment, 5—Trades-Unions.

CONSTABLE.

See Arrest, 15—Justice of the Peace, 6—Pleading, 19—Trespass to Person.

CONSTITUTIONAL LAW.

1. B. N. A. Act, s. 142—Award of 1870, validity of—Upper Canada Improvement fund—School fund—B. N. A. Act, s. 109—Trust created by—Effect of Confederation on:

   Provinces of Quebec and Ontario v. *Dominion of Canada —In re Common School Fund and Lands*, 349.

2. Cattle Protection Act, B.C., 1891—*Ultra vires*—Railways:

   Madden v. *Nelson and Fort Sheppard R. W. Co.*, 5 Brit. Col. L. R. 541.

CONSTITUTIONAL LAW—*Continued.*

3. Criminal Code, s. 540—Jurisdiction of County Courts in criminal matters—*Ultra vires*:

   Ex p. Wright, 34 N. B. Reps. 127.

4. Lord's Day Act, Nova Scotia, 54 V. c. 32—*Ultra vires*—Amendment of criminal law of Province before Confederation—Sunday—Performance of servile labour—Extension of prohibition to corporations—Property and civil rights:

   Reg. v. *Halifax Electric Tramway Co.*, 88; 30 N. S. Reps. 469.

5. Railways — Highways — Crossings — Maintenance of gates—Municipal corporations—Apportionment of cost—Railway Committee—Railway Act, 1888:

   In re Canadian Pacific R. W. Co. and County and Township of York, 48; 25 A. R. 65.

6. Railways—Restrictions under Dominion charter against crossing at grade—*Ultra vires*—Dominion Railway Act, 1888, ss. 21, 306, 307—Jurisdiction of Railway Committee:

   Grand Trunk R. W. Co. v. *Hamilton Radial Electric R. W. Co.*, 17 Occ. N. 220; 29 O. R. 143.

7. 8 V. c. 90—B. N. A. Act, s. 111—Liability of Province of Canada existing at time of union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver:

   Yule v. *The Queen*, 228.

See Railways and Railway Companies, 11.

CONTEMPT OF COURT.

Witness—Local manager of bank—Refusal to produce bank books or disclose bank accounts—Inconvenience—Privilege—Motion to commit—Service of papers:

Hannum v. *McRae*, 354; 18 P. R. 185.

See Division Courts, 1—Solicitor, 9.

CONTRACT.

1. Breach of contract to deliver goods—Recovery of damages—Proof of damage—What should be shewn—Counterclaim—Costs:

   Marshall v. *Matheson*, 31 N. S. Reps. 238.

2. Consideration in part illegal—Stifling prosecution:

   Leggatt v. *Brown*, 291; 29 O. R. 530.

3. Construction—Agreement with partnership — Execution by father of one partner—Surety or guarantor—Liability—Ratification of agreement—Pleading:

   Fane v. *Bancroft*, 30 N. S. Reps. 33.

CONTRACT—*Continued.*

4. Construction—Rectification—Satisfaction of debts—Accord and satisfaction—Agreement to accept interest in mining location, if valuable — Conditions not fulfilled—Reconveyance:

Whitla v. *Phair*, 145; 12 Man. L. R. 122.

5. Construction—Sale of goods or bailment—Interpleader issue as to ownership:

Holden v. *Hatfield*, 374.

6. Correspondence—Reference in, to a formal agreement to be executed—Execution of bond as security for performance of agreement—Non-execution of formal agreement:

Koksilah Quarry Co. v. *The Queen*, 5 Brit. Col. L. R. 525.

7. Failure of consideration—Recovery back of money paid—Sale of interest in invention—Subsequent refusal of application for patent—Mistake—Construction of memorandum of sale—Oral evidence to explain:

Chisholm v. *Peters*, 31 N. S. Reps. 16.

8. Information by Crown against contractor for negligent performance of his contract—Negligence—Sufficiency of proof—Liability:

Reg. v. *Poupore*, 17 Occ. N. 365; 6 Ex. C. R. 4.

9. Notice to cancel—Gas supply shut off for non-payment of gas bill for other premises—Powers of gas company—12 V. c. 182:

Cadieux v. *Montreal Gas Co.*, 303; 28 S. C. R. 382.

10. Novation—Substitution of debtor—Evidence of:

Lewis v. *D'Entremont*, 29 N. S. Reps. 546.

11. Partnership—Chose in action—Assignment of—Novation—Set-off—Counter-claim:

Seyfang v. *Mann*, 214; 25 A. R. 179.

12. Public policy—Evading secrecy of tenders for municipal work—Partnership:

Stevenson v. *Boyd*, 5 Brit. Col. L. R. 626.

13. Restraint of trade—Breach—Assignment of interest *pendente lite*—Right to continue action:

Roper v. *Hopkins*, 325; 29 O. R. 580.

14. Sale of goods—Non-delivery within time agreed—Action for price—Counterclaim for breach—Damages—Certainty of profits—Burden of proof—Evidence:

Pictou Foundry and Mfg. Co. v. *Archibald*, 30 N. S. Reps. 262.

CONTRACT—*Continued.*

15. Sale of logs—What constitutes a sale—Delivery of possession —Bailment to manufacturer:

King v. *Dupuis*, 301; 28 S. C. R. 388.

16. Sealed instrument—Release—Consideration:

Donaldson v. *Wherry*, 306; 29 O. R. 552.

17. Specific performance—Agreement to bequeath estate—Remuneration for maintenance—Implied promise—Annual payments—Arrears—Statute of Limitations:

Cross v. *Cleary*, 323; 29 O. R. 542.

18. Statute of Frauds—Parol agreement to purchase land for use of partnership:

Brown v. *Grady*, 6 Brit. Col. L. R. 190.

19. Unlawful consideration—Stifling prosecution—Conversion of trust property—Prosecution of trustee—Agreement to restore property—Contract of suretyship—Action against sureties:

Major v. *McCraney*, 5 Brit. Col. L. R. 571.

20. Work and labour—Mutual and independent promises—Defence—Non-performance—Remedy in damages:

Wright v. *Polson*, 30 N. S. Reps. 437.

See Arbitration and Award, 5—Bankruptcy and Insolvency, 23—Company, 1, 3, 4—Crown, 3-7—Division Courts, 6—Husband and Wife, 7—Insurance—Landlord and Tenant, 4—Maritime Law, 1—Master and Servant, 4-7—Medical Practitioner, 1—Mines and Minerals, 2—Municipal Corporations, 44—Negligence, 2—Parent and Child—Parties, 5, 8—Partnership, 1—Pleading, 3—Railways and Railway Companies, 1, 7, 12—Sale of Goods—Sale of Land, 1-4, 6—Solicitor, 11—Street Railways, 1—Trial, 3—Vendor and Purchaser, 1.

CONTRIBUTION.

See Principal and Surety, 2.

CONTRIBUTORIES.

See Company, 6.

CONTRIBUTORY NEGLIGENCE.

See Jury, 1—Master and Servant, 10, 11—Municipal Corporations, 32.

CONVERSION.

See Amendment, 4—Appeal, 20—Bills of Sale and Chattel Mortgages, 6—Contract, 19—Damages, 6.

CONVICTION.

See Canada Temperance Act—Certiorari, 1, 2, 4, 5—Costs, 17, 18, 46—Criminal Law—Indian—Justice of the Peace—Liquor License Act—Police Magistrate—Prohibition, 5—Statutes, 1—Summary Conviction.

CORONER'S INQUEST.

See Criminal Law, 5.

CORPORATION.

See Company—Municipal Corporations.

CORPORATION SOLE.

Covenant by Bishop—Description as corporation sole—Covenant for heirs, executors, and administrators — Question whether successors bound:

Paris v. *Bishop of New Westminster*, 5 Brit. Col. L. R. 450.

CORROBORATION.

See Specific Performance, 1, 2.

CORRESPONDENCE.

See Contract, 6—Letters.

CORRUPT PRACTICES.

See Parliamentary Elections, 3.

COSTS.

1. Amendment of defence at trial—Terms—Quantum of costs:

Gordon v. *City of Victoria*, 6 Brit. Col. L. R. 129.

2. Appeal as to—Error in principle—Recovery of land—Construction of will—Improvements under mistake of title—Reference:

Crawford v. *Broddy*, 376; 18 P. R. 233.

3. Appeal for costs:

Scarry v. *Wilson*, 294; 12 Man. L. R. 216.

4. Apportionment of, according to event of issues—Discretion of trial Judge—Costs of interlocutory motion—Appeal from order disposing of:

Freeman v. *Mitchell*, 30 N. S. Reps. 513.

5. Depriving successful party of—Discretion of trial Judge—Reversal on appeal:

Garden v. *Neily*, 31 N. S. Reps. 89.

COSTS—*Continued.*

6. Discretion of trial Judge in jury case—Appeal—"Good cause"—Jurisdiction of full Court, B.C.:
   Gibson v. *Cook*, 5 Brit. Col. L. R. 534.

7. Executor—Personal order against—Unnecessary appeal:
   In re Fraser Estate, 30 N. S. Reps. 272.

8. Foreclosure suit—Offer to suffer judgment by default—Offer made by one of several defendants—Effect on costs—Application to foreclosure suit:
   Jeffries v. *Blair*, 17 Occ. N. 203; 1 N. B. Eq. Reps. 420.

9. *Habeas corpus*—Infant—Jurisdiction to award costs:
   Re Quai Shing, an Infant, 6 Brit. Col. L. R. 86.

10. Inquisition in lunacy—Death of supposed lunatic before determination:
   In re Kaye, 6 Brit. Col. L. R. 61.

11. Interlocutory motions—Costs out of estate—Consent judgment without costs—Effect of:
   Campbell v. *Dunn*, 382.

12. Motion for judgment in default of defence—Statement filed after motion launched:
   San Francisco Mining Co. v. *Martin*, 5 Brit. Col. L. R. 538.

13. New question of practice:
   Clairmonte v. *Prince*, 30 N. S. Reps. 258.

14. Order of Court fixing amount *en bloc*—Taxation—Judge in Equity:
   In re Consolidated Electric Company Cases, 34 N. B. Reps. 35.

15. Particular summons for examination of parties—General summons for directions in action under Rule 269 (a)—Costs reserved:
   Jones v. *Pemberton*, 6 Brit. Col. L. R. 67.

16. Quashing appeal—No motion to quash:
   Videan v. *Westover*, 83; 29 O. R. 1.

17. Quashing summary conviction:
   Reg. v. *Grant*, 30 N. S. Reps. 368.

COSTS—*Continued.*

18. Removal of conviction into High Court—Subsequent application in High Court—Costs of, ordered to be paid by applicant, the convicting magistrate, to the clerk of the peace—Jurisdiction to make order—Criminal Code, ss. 897, 898—"Appeal"—Sessions—Rescission of order as to costs made without jurisdiction—Forum—Weekly Court—Divisional Court:

Reg. v. *Graham*, 133; 29 O. R. 193.

19. Scale of—Action to set aside fraudulent conveyance—Amount of subject-matter:

Morphy v. *Fawkes*, 20; 18 P. R. 24.

20. Scale of—Cause removed from Surrogate Court—Order of transfer—Terms—Consent judgment—Costs out of the estate:

In re Forster—Battisby v. *Witherspoon*, 83; 18 P. R. 65.

21. Scale of—County Court action—Motion to change venue—Appeal:

In re Hicks v. *Mills*, 223; 18 P. R. 123.

22. Scale of—Jurisdiction of County Court—Action on promissory notes—Amount in controversy:

Allan v. *Clougher*, 330.

23. Scale of—Jurisdiction of County Court—Trespass to land—Injunction—Counterclaim—Declaratory judgment:

Fitchett v. *Mellow*, 280; 18 P. R. 161.

24. Scale of—Recovery of ten cents—Action to test right:

Clarry v. *Grand Trunk R. W. Co.*, 13; 29 O. R. 18.

25. Scale of—Taxation of costs of Court of Appeal—High Court action—Amount of recovery—Appeal from taxation—Forum:

Holmes v. *Bready*, 111, 120; 18 P. R. 79.

26. Security for—Appeal—Failure to comply with terms of order—Dismissal of appeal—"Forthwith," meaning of:

Morton v. *Bank of Montreal*, 157.

27. Security for—Infant plaintiff out of jurisdiction—Next friend in jurisdiction—Insolvency:

Roberts v. *Coughlin*, 138; 18 P. R. 94.

28. Security for—Libel—Newspaper—Commercial agency bulletin—R. S. O. c. 168, s. 1:

Slattery v. *Dun*, 312; 18 P. R. 168.

COSTS—*Continued.*

29. Security for—Libel—Newspaper—R. S. O. c. 57, s. 9—Contentious affidavit in answer:

Bartram v. *London Free Press Printing Co.*, 22; 18 P. R. 11.

30. Security for—Order for—Application to set aside—Terms—Payment of costs—Form of order—Dismissal of action:

Lea v. *Lang*, 11; 18 P. R. 1.

31. Security for—Plaintiff abroad—Right of defendant against whom plaintiff has judgment:

Thibaudeau v. *Scott*, 30; 1 N. B. Eq. Reps. 505.

32. Security for—Plaintiff abroad—Judgment by default—Defendant allowed in to defend on terms:

Davis v. *Taeger*, 140.

33. Security for—Plaintiff abroad—Property within jurisdiction—Administration order—Consent to charge share with costs—Place of reference:

In re Armstrong—Armstrong v. *Armstrong*, 80; 18 P. R. 55.

34. Security for—Sheriff—Public duty—Executing writ of *fi. fa.*—R. S. O. c. 89, s. 1:

Creighton v. *Sweetland*, 341; 18 P. R. 180.

35. Set-off—Interlocutory costs—Rules 1164, 1165—Discretion of taxing officer—Appeal:

Wright v. *Calvert*, 218.

36. Set-off—Solicitor's lien:

Worden v. *Rawlins*, 17 Occ. N. 341; 1 N. B. Eq. Reps. 450.

37. Special case:

Mitchell v. *Kinnear*, 1 N. B. Eq. Reps. 427.

38. Successful party to arbitration — Deduction of costs from amount awarded—Jurisdiction of Judge in Chambers:

Re Dwyer and Victoria Waterworks Arbitration, 6 Brit. Col. L. R. 165.

39. Summary disposal of, in Chambers—Jurisdiction—Absence of consent—Object of action not attained:

Hunter v. *Town of Strathroy*, 191; 18 P. R. 127.

40. Taxation—Depositions not used at trial—Counsel fee—Quantum—Review:

Rondot v. *Monetary Times Printing Co.*, 237; 18 A. R. 141.

COSTS—*Continued.*

41. Taxation—Notice of—Time for—"One day's notice:"
Barrowman v. *Fader*, 31 N. S. Reps. 29.

42. Taxation—Retaxation before Judge — Appeal from — Discretion of Judge—Question of principle—Costs of retaxation:
Palgrave Gold Mining Co. v. *McMillan*, 31 N. S. Reps. 198.

43. Third party—Dismissal of action—Discretion of trial Judge—Appeal:
Ewing v. *City of Toronto*, 237; 18 P. R. 137.

44. Trustees—Removal—Grounds of:
In re Merritt (Charles) Trusts, 1 N. B. Eq. Reps. 425.

45. Unnecessary motion—Justification for—Letters of solicitor:
In re Township of Raleigh and Township of Harwich, 78; 18 P. R. 73.

46. Unopposed motion to quash conviction:
Reg. v. *McLeod*, 30 N. S. Reps. 191.

See Amendment, 3, 5—Appeal, 2, 5, 6, 16, 22, 31, 36, 38—Arbitration and Award, 1—Arrest, 5, 13—Attachment of Debts, 2—Bankruptcy and Insolvency, 7—Bastard—Company, 2, 9—Contract, 1—County Courts, 5—Deed, 6—Exchequer Court of Canada, 1—Execution, 5—Executors and Administrators, 1—Husband and Wife, 4—Insurance, 21—Judgment, 8, 14—Jury Notice, 1—Justice of the Peace, 5—Landlord and Tenant, 9—Libel, 1—Libel and Slander—Mortgage, 10—New Trial, 2, 5—Parties, 1, 11—Partnership, 2—Pleading, 14—Principal and Agent, 4—Probate Courts, 2—Prohibition, 5—Railways and Railway Companies, 12—Ship, 1—Solicitor, 1, 4-7, 10-12—Specific Performance, 2—Summary Conviction, 1, 3, 8—Tender—Trial, 9—Trusts and Trustees, 1, 4.

COUNSEL.

See Malicious Prosecution, 2—Pleading, 9.

COUNSEL FEES.

See Costs, 40—Solicitor, 6.

COUNTERCLAIM.

See Contract, 1, 11, 14—Costs, 23—County Courts, 1.

COUNTY COURT JUDGE.

See Appeal, 39—Assessment and Taxes, 1—Liquor License Act, 2—Municipal Elections—Prohibition, 3, 4, 5.

COUNTY COURTS

1. Counterclaim in excess of jurisdiction—Abandonment of excess—Transfer to Queen's Bench:

McIlroy v. *McEwan*, 203; 12 Man. L. R. 164.

2. Jurisdiction—Action for recovery of money paid—Estoppel—Equitable claim:

Crayston v. *Massey-Harris Co.*, 121; 12 Man. L. R. 95.

3. Order in term—Reversal of verdict—Jurisdiction—Rule 615—Appeal:

Donaldson v. *Wherry*, 306; 29 O. R. 552.

4. Stay of proceedings in—Application to enforce judgment in County Court by issue of execution—Action in Supreme Court for cross-relief:

Clattenburg v. *Morine*, 30 N. S. Reps. 221.

5. Trial—Defendant not present at—*Ex parte* judgment—Setting aside—Costs:

Fillis v. *Conrod*, 30 N. S. Reps. 441.

6. Unstamped summons—Power of Court to affix stamps after judgment—"Knowingly and wilfully" violating Act:

Aldrich v. *Nest Egg Co.*, 6 Brit. Col. L. R. 53.

See Appeal, 15, 16, 28, 29—Constitutional Law, 3—Costs, 21, 22—Criminal Law, 11—Equitable Execution, 2—Evidence, 10—Law Stamps—Prohibition, 1, 2.

COURT HOUSE.

See Municipal Corporations, 12.

COURT OF APPEAL.

See Appeal, 21-25—Costs, 25—Executors and Administrators, 1.

COURT OF RECORD.

See Police Magistrate, 2.

COURT OF REVISION.

See Appeal, 12—Assessment and Taxes, 1, 9, 12—Municipal Corporations, 19—Prohibition, 3.

COURTS.

1. Decision of Courts of co-ordinate jurisdiction in criminal cases—Effect of:

Reg. v. *Hammond*, 82; 29 O. R. 211.

COURTS—*Continued.*

2. Trial of issue of law—Forum—Single Judge:
Knauth Nachod v. *Stern*, 30 N. S. Reps. 251.

3. Weekly Court—Divisional Court—Forum for rescinding order as to costs made without jurisdiction in a criminal case:
Reg. v. *Graham*, 133; 29 O. R. 193.

See Action, 4—Advocate, 2—Appeal, 3, 4, 5, 12, 26—Company, 16, 19—Costs, 18—County Courts—Criminal Law, 11—Division Courts—Mechanics' Liens, 2—Municipal Elections—Probate Courts—Receiver, 4—Railways and Railway Companies, 4—Solicitor, 11—Supreme Court of Canada—Surrogate Courts.

COVENANT.

Sale of medical practice—Covenant to discontinue practice and residence—Legality—Restraint of trade—Condition precedent—Waiver—Injunction—Unregistered physician:
Ryan v. *McNichol*, 1 N. B. Eq. Reps. 487.

See Bills of Sale and Chattel Mortgages, 4—Corporation Sole—Deed, 7—Landlord and Tenant, 2, 5, 13—Mortgage, 3, 12, 13—Principal and Surety, 3—Prohibition, 11—Sale of Land, 2—Vendor and Purchaser, 2.

CRIMINAL CODE.

See Constitutional Law, 3—Costs, 18—Criminal Law.

CRIMINAL CONVERSATION.

See Discovery, 5.

CRIMINAL LAW.

1. Arrest of prisoner in Manitoba without warrant—Offence committed in another Province—Representation by telegram as to issue of warrant—Criminal Code, s. 552—58 & 59 V. c. 40—*Habeas corpus*—Validity of arrest—Bail:
Reg. v. *Cloutier*, 269; 12 Man. L. R. 183.

2. Assault—Consent to fight—Breach of the peace:
Reg. v. *Buchanan*, 293; 12 Man. L. R. 190.

3. Assault—Prosecution for—Complaint not preferred by person aggrieved—Civil action—Bar:
Miller v. *Lea*, 391; 25 A. R. 428.

4. Demanding property with menaces—Criminal Code, s. 404—Intent to steal—Evidence:
Reg. v. *Lyon*, 289; 29 O. R. 497.

CRIMINAL LAW—*Continued.*

5. Evidence — Admissibility — Criminating answers given at coroner's inquest—Subsequent trial for murder—Privilege —56 V. c. 31, s. 5—Insurance crime—Evidence of rejected applications for insurance—Courts of co-ordinate jurisdiction—Decisions of in criminal cases:

   Reg. v. *Hammond*, 82; 29 O. R. 211.

6. Evidence—Admissibility of evidence to shew that a witness at the trial had made inconsistent statements before a magistrate—Materiality—*Res gestae*—What was said when assault committed—New trial:

   Reg. v. *Troop*, 30 N. S. Reps. 339.

7. Evidence—Murder — Dying declaration—Admissibility—Belief of impending death—Power to review finding of trial Judge upon:

   Reg. v. *Davidson*, 30 N. S. Reps. 349.

8. Extradition—Embezzlement—Proof of offence—Depositions—Hearsay—Absence of particulars—Admissions of accused —Evidence of—Foundation for:

   In re Ockerman, 163; 6 Brit. Col. L. R. 143.

9. Extradition—Offence referred to by wrong name—Theft—Larceny:

   In re Gross, 167; 25 A. R. 83.

10. Indictable offence—Charge against incorporated company—Preliminary inquiry before police magistrate—Criminal Code, s. 448—Prohibition:

    In re Reg. v. *T. Eaton Co.* (*Ltd.*), 345; 29 O. R. 591.

11. Jurisdiction of County Courts—Courts of Oyer and Terminer Attempt to have carnal knowledge of girl under fourteen —*Habeas corpus*—Delay in bringing to trial:

    Ex p. Wright, 34 N. B. Reps. 127.

12. Larceny from the person—Sentence—Police magistrate—Jurisdiction—Consent—Criminal Code, ss. 344, 783, 785, 787:

    Reg. v. *Conlin*, 15; 29 O. R. 28.

13. Menaces—Endeavour to obtain money by—Criminal Code, s. 404—Evidence:

    Reg. v. *Gibbons*, 243; 12 Man. L. R. 154.

14. Murder—Evidence—Dying declarations—Improper admission of evidence—Effect of—No miscarriage:

    Reg. v. *Woods*, 5 Brit. Col. L. R. 585.

CRIMINAL LAW—*Continued.*

15. Murder — Poisoning — Design — Evidence — Admissibility—Death of former husband of prisoner:

Reg. v. *Sternaman*, 56; 29 O. R. 33.

16. Neglect of husband to support wife—Criminal Code, s. 210, s.-s. 2—Conviction—Evidence:

Reg. v. *Pennock*, 79.

17. Neglect of husband to support wife—Criminal Code, s. 210, s.-s. 2—Denial of marriage—Death of former husband—Evidence—Presumption:

Reg. v. *Holmes*, 113; 29 O. R. 362.

18. Obstructing bailiff—Execution of process against goods—Agent of bailiff—Agreement—Criminal Code, s. 144:

Reg. v. *Carley*, 26.

19. Offence for which offender may be arrested without warrant—Criminal Code, s. 25—Unlawfully wounding—Action for false arrest—Arrest of offender by officer having a defective warrant—Justification as arrest without warrant—Question for jury—Damages—Misdirection—Evidence—Proof of fact of wounding:

Jordan v. *McDonald*, 31 N. S. Reps. 129.

20. Perjury—False statutory declaration—Indictment—Omission of statement of intent to mislead—Criminal Code—Forms—Preliminary inquiry—Evidence taken against three defendants—Amendment of indictment—Privilege of Crown prosecutor—Election as to method of trial—Right to re-elect after amendment—Admissibility of evidence—Statement on oath at preliminary inquiry—Authorized declaration—Canada Evidence Act, 1893, s. 26—Indictable offence—Joint declaration by three persons:

Reg. v. *Skelton*, 205.

21. Perjury *ex facie curiae*—Commital for trial—Bail—Release:

In re Ruthven, 6 Brit. Col. L. R. 115.

22. Procedure—Criminal Code, s. 645—Omission of foreman of grand jury to place initials opposite names of witnesses:

Reg. v. *Buchanan*, 293; 12 Man. L. R. 190.

23. Procedure—Indictment—Preferment of—Necessity for presence of prosecutor or Crown officer—Criminal Code, s. 641:

Reg. v. *Hamilton*, 30 N. S. Reps. 322.

24. Procedure—Speedy trial—Adjournment—Rights of Crown:

Reg. v. *Gordon*, 6 Brit. Col. L. R. 160.

CRIMINAL LAW—*Continued.*

25. Procuring female for prostitution—Commitment—Recital of invalid conviction—Duplicity—Criminal Code, ss. 185, 800:
Reg. v. *Gibson*, 364; 29 O. R. 660.

26. Rape—Girl under fourteen years of age:
Ex p. Wright, 34 N. B. Reps. 127.

27. Rape—Indictment for—Conviction for common assault—Time within which complaint laid—Criminal Code, s. 841:
Reg. v. *Edwards*, 236; 29 O. R. 451.

28. Receiving stolen goods—Prisoner an accessory, before the fact, to the theft—Evidence of the thief:
Reg. v. *Hodge*, 424.

29. Theft—Speedy trial before County Court Judge—Several distinct offences—Verdict in each withheld until conclusion of all—Wrongful conviction—New trial—Evidence—Intent—Acts of like character—Admissibility:
Reg. v. *McBerny*, 29 N. S. Reps. 327.

30. Threat of serious bodily harm—Imprisonment in default of finding sureties to keep the peace—Warrant of commitment—Form—Recitals—Discharge of prisoner:
Reg. v. *Macdonald*, 70.

31. Threatening letter—Evidence of sending—*Prima facie* case—Comparison of handwriting—Duty of jury—Direction of Court—Admissions of prisoner—Identification of letter—Admissibility of evidence improperly received in the first place when evidence of identity afterwards supplied—Necessity for fresh tender:
Reg. v. *Dixon*, 29 N. S. Reps. 462.

32. Trial—Improper comment by counsel for prosecutor—Failure of prisoner's wife to testify—56 V. c. 32, s. 4, s.-s. 2—New trial:
Reg. v. *Corby*, 30 N. S. Reps. 330.

33. Unnatural offence—Boy under fourteen incapable of committing—Assault—Criminal Code:
Reg. v. *Hartlen*, 30 N. S. Reps. 317.

34. Wilfully killing a dog—Criminal Code, s. 510—Conviction—Penalty—Imprisonment with hard labour in default of payment of fine—Criminal Code, s. 872 (*b*)—*Habeas corpus*—Discharge—Condition not to prosecute:
Reg. v. *Horton*, 31 N. S. Reps. 217.

See Appeal, 44—Constitutional Law, 3, 4—Costs, 18—Courts, 1, 3—Game—Law Stamps—Prohibition, 5—Summary Conviction—Venue, 2.

CRIMINAL PROCEDURE.

See Criminal Law.

CRIMINAL PROCEEDINGS.

See Duress.

CROWN.

1. Civil servant—Superannuation allowance—R. S. C. c. 18—Construction of—Discretion—Governor in Council—Jurisdiction of Exchequer Court:

Balderson v. *The Queen*, 209; 6 Ex. C. R. 8; 28 S. C. R. 261.

2. Civil Service Act, R. S. O. c. 17, s. 51—Construction of—Civil servant—Extra work—Remuneration—Permanent employees:

Bradley v. *The Queen*, 17 Occ. N. 389; 27 S. C. R. 657.

3. Contract—Conflict of laws—Appropriation of payments—Receipt—Error—Rectification:

Reg. v. *Ogilvie*, 6 Ex. C. R. 21.

4. Contract—Construction of—Public works—Arbitration—Progress estimates—Engineer's certificate—Approval by head of department—Final estimates—Condition precedent:

Goodwin v. *The Queen*, 273; 28 S. C. R. 273.

5. Contract—Department of Railways and Canals—R. S. C. c. 37, s. 23—Requirements of, with regard to signing of contract—Public works—Purchase of goods for—Verbal orders by officers of Crown—Recovery against Crown—Interest:

Reg. v. *Henderson*, 28 S. C. R. 425.

6. Contract—Purchase of goods—Acceptance—Part payment—Ratification—Recovery of balance—Interest—When to begin:

Henderson v. *The Queen*, 6 Ex. C. R. 39.

7. Contract—Statutory requirements — Informality—Ratification by Crown by Order in Council:

Woodburn v. *The Queen*, 77; 6 Ex. C. R. 12.

8. Negligence of servants of—Government canal—Accident to vessel using same—Liability—Exchequer Court Act:

McKay v. *The Queen, St. Lawrence Sugar Refining Co.* v. *The Queen*, 6 Ex. C. R. 1.

9. Public work—Canal—Drainage—Flooding land—Liability of Crown—Damages—Assessment—Mode of:

Davidson v. *The Queen*, 6 Ex. C. R. 51.

CROWN—*Continued.*

10. Public work—Negligence of servants—Scope of employment —"On any public work"—Exchequer Court Act, s. 16 (d) —Place where injury sustained:

Alliance Assurance Co. v. *The Queen*, 6 Ex. C. R. 76.

See Contract, 8—Damages, 1—Exchequer Court of Canada.

CROWN BOND.

Lien on real estate—Priority over mortgages and executions—Enforcement of lien—Writ of extent—Prerogative of Crown:

Reg. v. *Sivewright*, 34 N. B. Reps. 144.

CROWN GRANT.

See Municipal Corporations, 33.

CROWN LANDS.

1. Free grant lands—Sale of timber by locatee—Validity of—Subsequent issue of patent to vendor—Estoppel:

Chapiewski v. *Campbell*, 192; 29 O. R. 343.

2. Possession of waste lands — Trespass —Application for grant —Injunction to restrain—Presumed justice of the Crown —Reservation of lands from settlement—Cancellation:

Nelson and Fort Sheppard R. W. Co. v. *Parker*, 6 Brit. Col. L. R. 1.

3. Timber license—Regulations—Agreement to assign license—Assignment to innocent purchaser—Notice—Priority—License not an interest in land—Registration of assignment—Agreement not to bid at public sale—Legality of:

Laughlan v. *Prescott*, 17 Occ. N. 150; 1 N. B. Eq. Reps. 406.

CURATOR.

See Mortgage, 1.

CUSTOMS WAREOUSE.

See Canada Temperance Act, 7.

DAMAGES.

1. Assessment—Mode of—Flooding land by Crown drain:

Davidson v. *The Queen*, 6 Ex. C. R. 51.

2. Detinue—No necessity to allege special damage:

Garden v. *Neily*, 31 N. S. Reps. 89.

3. Excessive damages—Reduction—New trial:

Curran v. *Grand Trunk R. W. Co.*, 396; 25 A. R. 407.

DAMAGES—*Continued.*

4. Excessive damages—Street railways—Action for bodily injuries:

Fraser v. *London Street R. W. Co.*, 259; 29 O. R. 411.

5. Measure of—Action against municipal corporation for injury to land—Misdirection—New trial:

Lloy v. *Town of Dartmouth*, 30 N. S. Reps. 208.

6. Measure of—Conversion of goods:

Light v. *Hawley*, 16; 29 O. R. 25.

7. Remoteness—Animals killed on railway—Negligence of section man—Cattle-guards—Want of repair:

Styles v. *Michigan Central R. R. Co.*, 5.

8. Remoteness—Railway crossing—Accident—Bodily injuries—Mental shock:

Henderson v. *Canada Atlantic R. W. Co.*, 397.

9. Trespass to goods—Levy under judgment irregularly entered—No specific damage—Mere formal levy—Reduction of damages from $1,100 to $50:

Johnston v. *Miller*, 31 N. S. Reps. 83.

See Arrest, 14—Bankruptcy and Insolvency, 6—Bills of Sale and Chattel Mortgages, 6—Company, 2—Contract, 1, 14, 20—Crown, 9—Husband and Wife, 1—Injunction, 3, 4—Insurance, 10—Judgment, 1, 13—Landlord and Tenant, 2, 9—Libel, 1—Lis Pendens—Master and Servant, 2—Mines and Minerals, 2—Mortgage, 9—Municipal Corporations, 15, 18, 19, 23, 24, 32, 38, 41—Negligence, 2—Pleading, 1—Principal and Agent, 4—Railways and Railway Companies, 9, 11, 12—Sale of Land, 1, 4—Solicitor, 8—Street Railways, 3—Trades Unions—Vendor and Purchaser, 3—Water and Watercourses, 1, 2, 5.

DEATH.

See Master and Servant, 3, 12.

DEBENTURES.

See Company, 5.

DECLARATION.

See Criminal Law, 20—Pleading, 5.

DECLARATORY JUDGMENT.

See Costs, 23—Street Railways, 1.

DEDICATION.

See Municipal Corporations, 23.

DEED.

1. Acquiescence by first purchaser in subsequent deed by his vendor—Evidence—Nullity — Possession—Registry laws —Deed defective in form—Commencement of proof in writing—Secondary evidence—Warranty of title—Impeachment by grantee of warrantor—Litigious rights—Purchase of :

Powell v. *Watters*, 102; 28 S. C. R. 133.

2. Construction—Description—" In front of "—Evidence of agreement and acts done in pursuance of—Inadmissibility of, to control construction:

McIntyre v. *McKinnon*, 31 N. S. Reps. 54.

3. Construction—Habendum—Estate—Survivorship:

Mullin v. *Macklin*, 309.

4. Construction—Servitude—Roadway—User—Easement:

Riou v. *Riou*, 104; 28 S. C. R. 53.

5. Description—Appurtenances—Short Forms Act—R. S. O. 1877 c. 102, s. 4:

Hill v. *Broadbent*, 128; 25 A. R. 159.

6. Rectification—Fraudulent omission of lands from deed—Findings of jury—Fraud—Evidence—Burden of proof—Deficiency in quantity—Costs—Apportionment of, according to event of issues—Discretion of trial Judge—Costs of interlocutory motion—Appeal from order disposing of:

Freeman v. *Mitchell*, 30 N. S. Reps. 513.

7. Rectification—Intention of parties—Conveyance of undivided interest—Covenant for quiet possession—Express warranty—Action for breach—Implied covenant:

Schnare v. *Zwicker*, 31 N. S. Reps. 177.

8. Rectification—Mistake — Misrepresentations—Fraud—Description of land:

Feindel v. *Zwicker*, 31 N. S. Reps. 232.

See Easement, 3—Evidence, 6—Husband and Wife, 6—Judgment, 10—Mortgage—Registry Laws, 2—Trusts and Trustees, 6—Way, 4.

DEFAMATION.

See Libel—Libel and Slander—Slander.

DEMURRER.

Hearing of, before trial—Order for—Rules 162, 280, 335, 426, 440—Practice:

Foster v. *Municipality of Lansdowne*, 72; 12 Man. L. R. 41.

See Master and Servant, 1—Municipal Corporations, 16—Pleading, 6—Sale of Land, 2.

DEPOSITIONS.

See Costs, 40—Criminal Law, 8.

DESCRIPTION.

See Deed, 2, 5, 8—Way, 4.

DETINUE.

See Damages, 2.

DEVISE.

See Will.

DEVOLUTION OF ESTATES ACT.

1. Dower—Election—R. S. O. c. 127, s. 4:

Baker v. *Stuart*, 392; 25 A. R. 445.

2. Executors and administrators—Power to mortgage lands—Consent of official guardian:

In re Bennington, 239.

3. Widow's charge—Quantum of—Foreign estate—R. S. O. c. 127, s. 12:

Sinclair v. *Brown*, 239; 29 O. R. 370.

See Distribution of Estates—Dower, 2—Executors and Administrators, 5—Will, 12.

DIRECTORS.

See Company, 1, 3, 6—Evidence, 12—Judgment Debtor, 2.

DISCHARGE.

Of Mortgage—See Dower, 1.

Of Prisoner—See Arrest, 10, 11, 12.

Of Surety—See Principal and Surety, 3.

DISCLAIMER.

See Evidence, 6—Husband and Wife, 6—Will, 12.

DISCOVERY.

1. Examination of former officers of company—Notice of application for order to examine:

Hobbs v. *E. & N. R. W. Co.*, 5 Brit. Col. L. R. 461.

DISCOVERY—*Continued.*

2. Examination of officer of company—Assignor of chose in action—Rules 439, 441:

Bank of Toronto v. *Quebec Fire Insurance Co.*; *Bank of Toronto* v. *Keystone Fire Ins. Co. of St. John*, 58; 18 P. R. 41.

3. Examination of officer of company—Production of documents—Setting aside subpœna:

Alexander v. *Irondale, Bancroft, and Ottawa R. W. Co.*, 24, 58; 18 P. R. 20.

4. Examination of officers of street railway company—Conductor and motorman:

Dawson v. *London Street R. W. Co.*, 357; 18 P. R. 223.

5. Examination of parties—Criminal conversation—Alienation of affections—R. S. O. 1897 c. 73, ss. 7, 9:

Fleury v. *Campbell*, 181; 18 P. R. 110.

6. Examination of parties—Defendant, who is also guardian of infant defendants:

Beaven v. *Fell*, 5 Brit. Col. L. R. 453.

7. Examination of parties—Order for—Affidavit—Necessity for:

Elson v. *Canadian Pacific R. W. Co.*, 76; 6 Brit. Col. L. R. 71.

8. Examination of parties—Production of documents—Patent for invention—Action to restrain infringement—Denial of patent right—Details of business transactions—Postponement of discovery:

Dickerson v. *Radcliffe*, 25; 17 P. R. 586.

9. Examination of parties—Residence out of jurisdiction—Subpœna—Special order:

Connolly v. *Dowd*, 9; 18 P. R. 38.

10. Examination of parties—Right of party to withhold names of witnesses—Action for maliciously swearing out a search warrant—Refusal of defendant to disclose names of persons upon whose information he acted:

Jones v. *Pemberton*, 6 Brit. Col. L. R. 69.

11. Inspection—Coal mines—Preparation of plaintiff's case—Danger to property—Preservation of evidence—Inspection by indifferent persons:

Esquimalt and Nanaimo R. W. Co. v. *New Vancouver Coal Co.*, 6 Brit. Col. L. R. 194.

DISCOVERY—*Continued.*

12. Production of documents—Affidavit—Officer of company—Local manager of foreign company—Holding out—Estoppel:
Richards v. *British Columbia Goldfields Co.*, 5 Brit. Col. L. R. 483.

13. Production of documents—Affidavit of documents—Contradicting—Admissions of deponent—Examination for discovery—Documents mentioned in document produced:
Smedley v. *British America Assurance Co.*, 184; 18 P. R. 92.

14. Production of documents—Application before statement of claim—Pleading—False representations:
Arthur v. *Runians*, 357; 18 P. R. 205.

15. Production of documents—Order for—Default under—Motion to dismiss action—Failure to indorse notice on order—Judicature Ordinance, s. 311:
Doidge v. *Town of Regina*, 163.

16. Production of documents—Order for—When granted—Action for negligence:
Elson v. *Canadian Pacific R. W. Co.*, 76; 6 Brit. Col. L. R. 71.

See Bankruptcy and Insolvency, 5—Costs, 15—Particulars.

DISMISSAL.

Of Action—See Action, 2, 3—Appeal, 2—Costs, 30, 43—Discovery, 15—Parties, 11.

" Appeal—See Costs, 26.

" Petition—See Parliamentary Elections, 3.

" Servant—See Master and Servant, 4-7.

" Teacher—See Schools, 2.

DISQUALIFICATION.

See Justice of the Peace, 2, 3, 4—Liquor License Act, 1, 3—Police Magistrate, 1.

DISTRESS.

Mortgagor and mortgagee—Decease of mortgagor—Seizure of goods of another on mortgaged premises—Authority of bailiff—Principal and agent—Mortgagee's agent controlling bailiff—Evidence—Admissibility—Letter of solicitor before action:
McBride v. *Hamilton Provident and Loan Society*, 116; 29 O. R. 161.

See Landlord and Tenant, 3, 6-9—Summary Conviction, 2.

DISTRIBUTION OF ESTATES.

Relinquishment by son of share in father's estate—Pre-decease of son—Right of his children to share on intestacy—Advancement—Hotchpot:

In re Lewis Estate, 278; 29 O. R. 609.

DITCHES AND WATERCOURSES.

57 V. c. 55—Owner—Appeal from award—Service of notices—Deepening ditch:

Township of Logan v. *Township of McKillop*, 394.

DIVISION COURTS.

1. After-judgment summons—Disobedience to—Order to commit—Married woman judgment debtor—Debt contracted before marriage—Form of judgment—Contempt—Punishment—Execution:

In re Teasdall v. *Brady*, 181; 18 P. R. 104.

2. Appeal from—Right of—Issue as to satisfaction of judgment—Trial in Chambers—Prohibition—Application for—Forum—Chambers:

Johnston v. *Galbraith*, 58.

3. Attachment of debts—Payment to garnishing creditors of another person of same name—Orders of Division Court—Protection to garnishees:

Andrew v. *Canadian Mutual L. & I. Co.*, 138; 29 O. R. 355.

4. Claims over $100—Dispensing with taking down evidence—Necessity for written consent:

Davidson v. *Head*, 260.

5. Jurisdiction—Agreement for sale of machine—Ascertainment of amount over $100—Mandamus:

In re Sawyer and Massey Co. v. *Parkin*, 55; 28 O. R. 662.

6. Jurisdiction—Contract—Commission—Fixed amount — Interest—Appeal:

Petrie v. *Machan*, 55; 28 O. R. 642.

See Appeal, 26, 27—Landlord and Tenant, 7—Prohibition, 6-13.

DIVISIONAL COURTS.

See Appeal, 26-31—Courts, 3—Executors and Administrators, 1.

DOCUMENTS.

See Discovery, 3, 8, 12-16.

DOWER.

1. Mortgaged lands—Purchase of equity of redemption—Discharge of existing mortgage—New mortgage—Registration—Equitable dower—42 V. c. 22—Legal estate—Momentary seisin:
In re Luckhardt, 57; 29 O. R. 111.

2. Widow's election—Devolution of Estates Act—Time—Ascertainment of rights—Construction of will—Administration by Court:
Baker v. *Stuart*, 174; 29 O. R. 388.

See Devolution of Estates Act, 1.

DRAINAGE.

See Crown, 9—Damages, 1—Municipal Corporations, 15-21.

DRAINAGE REFEREE.

See Appeal, 22.

DUPLICITY.

See Criminal Law, 25—Pleading, 5.

DURESS.

1. Threat of criminal proceedings—Communication by agent—Conveyance of land so obtained set aside:
Burris v. *Rhind*, 30 N. S. Reps. 405.

2. Threat of criminal proceedings—Security obtained by means of—Debt actually due—Security given by debtor—Finding of jury—Absence of agreement to stifle prosecution—Judgment contrary to finding:
Fulton v. *Kingston Vehicle Co.*, 30 N. S. Reps. 455.

See Municipal Corporations, 39.

DYING DECLARATION.

See Criminal Law, 7, 14.

EASEMENT.

1. Eaves of building overhanging land—Title to surface—Injunction—Estoppel:
Wood v. *Gibson*, 30 N. S. Reps. 15.

2. Right of way—Prescription—Landlord and tenant—Acknowledgment by tenant:
Ker v. *Little*, 395; 25 A. R. 387.

3. Sewer—Deed—Absence of reservation—Easement of necessity:
Verney v. *Guthrie*, 413.

See Deed, 4—Water and Watercourses, 6—Way, 1, 2, 4.

EJECTMENT.

See Limitation of Actions, 2—Sale of Land, 6.

ELECTION.

See Criminal Law, 20—Devolution of Estates Act, 1—Dower, 2—Landlord and Tenant, 5—Money in Court, 2—Sale of Goods, 1.

ELECTIONS.

See Municipal Elections—Parliamentary Elections.

EMBEZZLEMENT.

See Criminal Law, 8.

ENGINEER'S CERTIFICATE.

See Crown, 4.

EQUITABLE ASSIGNMENT.

See Chose in Action, 2.

EQUITABLE CHARGE.

See Company, 3.

EQUITABLE CLAIM.

See Prohibition, 9.

EQUITABLE DEMAND.

See County Courts, 2.

EQUITABLE EXECUTION.

1. Injunction—Simple contract creditor—Execution before judgment—Discretion—Dissolving injunction—Appeal— Preserving rights of parties:

Pacific Investment Co. v. *Swann*, 97, 124.

2. Receiver—Pension payable by municipality to retired official —Liability for payment of debts—Debtor out of jurisdiction—No property in jurisdiction—Process by attachment inapplicable—Appointment of receiver—Jurisdiction of County Court:

Imperial Bank v. *Motton*, 29 N. S. Reps. 368.

See Absconding Debtor—Receiver, 1, 2.

EQUITY OF REDEMPTION.

See Dower, 1.

ESCROW.

See Judgment, 15.

ESTATE.

See Deed, 3—Trusts and Trustees, 6—Will.

ESTOPPEL.

Conveyance by married woman—Agreement—Recital:
Boulton v. *Boulton*, 334; 28 S. C. R. 592,

See Attachment of Debts, 2—Bills of Exchange and Promissory Notes, 3—Bills of Sale and Chattel Mortgages, 4—Company, 17—Crown Lands, 1—County Courts, 2—Discovery, 12—Easement, 1—Insurance, 23—Limitation of Actions, 4—Mines and Minerals, 8, 9—Mortgage, 7—Municipal Corporations, 13, 33—Registry Laws, 3—Sale of Land, 4, 6—Water and Watercourses, 5.

EVIDENCE.

1. Action for indecent assault—Evidence of reputation—Evidence of specific acts of impropriety:
Gross v. *Brodrecht*, 17 Occ. N. 397; 24 A. R. 687.

2. Admissibility—Evidence of common rumour—Appreciation of evidence—Affirmative or negative testimony—Interested witnesses—Appeal on questions of fact—Supreme Court of Canada:
Lefeunteun v. *Beaudoin*, 103; 28 S. C. R. 89.

3. Admissibility—Letter of solicitor before action:
McBride v. *Hamilton Provident and Loan Society*, 116; 29 O. R. 161.

4. Application for sale of lands to satisfy judgment—Insufficiency of proof of registration of judgment—Affidavit of clerk of plaintiffs—Absence of certified copy of certificate of judgment as registered—Refusal to postpone hearing of appeal for purpose of adducing further evidence:
Massey-Harris Co. v. *Warener*, 33; 12 Man. L. R. 48.

5. Corroboration—Evidence of accomplice in fraud—Civil action:
Graham v. *British Canadian L. & I. Co.*, 34, 315; 12 Man. L. R. 244.

6. Deed not delivered—Evidence of intention to disclaim:
Routledge v. *Routledge*, 30 N. S. Reps. 151.

7. Discrediting witness—Previous inconsistent statement:
Gates v. *Lohnes*, 31 N. S. Reps. 221.

8. Examination of witness *de bene esse*—When ordered—Illness—Time—Notice to proceed:
Bank of Montreal v. *Horne*, 6 Brit. Col. L. R. 68.

9. Expert in handwriting—Evidence to show when words added to promissory note—Admissibility:
British Columbia Land and Investment Agency (Ltd.) v. *Ellis*, 6 Brit. Col. L. R. 82.

EVIDENCE—*Continued.*

10. Leave to adduce further evidence on appeal—County Court action:

Hickman v. *Baker*, 31 N. S. Reps. 208.

11. Life insurance—Fraudulent intent—Evidence of similar acts of fraud—Admissibility:

Mutual Life Ass. Co. of New York v. *Jonah*, 17 Occ. N. 343; 1 N. B. Eq. Reps. 482.

12. Production of bank books—Duty of manager of bank when subpœnaed as a witness—Bank Act, s. 46—Directors:

Hannum v. *McRae*, 354; 18 P. R. 185.

13. Title to land—Sheriff's deed—Evidence of execution under which sale made—Necessity for—Secondary evidence, where writ lost—Foundation for—*Omnia rite esse acta*—Evidence against successor in title:

Ross v. *Adams*, 34 N. B. Reps. 158.

See Affidavit—Appeal, 18, 19, 20, 51—Arbitration and Award, 2—Bankruptcy and Insolvency, 18—Bills of Exchange and Promissory Notes, 2, 4—Canada Temperance Act, 6—Contract, 7, 14—Criminal Law, 4-7, 8, 13-17, 19, 20, 28, 29, 31, 32—Deed, 1, 2, 6—Discovery—Distress—Division Courts, 4—Exchequer Court of Canada, 2—Executors and Administrators, 3—Fraudulent Conveyance, 1—Game—Gift, 2—Husband and Wife, 4, 5, 6—Insurance, 5—Jury, 2—Landlord and Tenant, 13—Libel, 1, 2, 3, 5—Limitation of Actions, 4—Liquor License Act, 1, 2, 4, 5—Malicious Prosecution—Master and Servant, 4, 5, 6, 8, 9, 12—Medical Practitioner, 2—Mortgage, 11—Municipal Corporations, 33, 37—Negligence, 1—New Trial, 1—Parent and Child—Particulars—Partnership, 4—Railways and Railway Companies, 2, 8, 13—Real Property Act—Sale of Goods, 6—Seduction—Slander—Solicitor, 8, 9, 11—Specific Performance, 1, 2—Street Railways, 4—Summary Conviction, 4—Time—Trial, 4—Trusts and Trustees, 1.

EXAMINATION.

In Insolvency—See Bankruptcy and Insolvency, 5.

Of Judgment Debtor—See Judgment Debtor.

Of Parties—See Costs, 15—Discovery, 1-10, 13.

Of Witness—See Evidence, 8—Time.

EXCESSIVE DAMAGES.

See Damages, 3, 4.

EXCHEQUER COURT OF CANADA.

1. Practice—Joinder of claims—Information of intrusion—Possession—Mesne profits—Judgment by default—Costs—Crown:

Reg v. *Kilroe*, 6 Ex. C. R. 80.

2. Reference of claim to—Decision of Minister of Customs—R. S. C. c. 32, ss. 182, 183—Evidence—Appeal:

Tyrrell v. *The Queen*, 389.

See Amendment, 2—Appeal, 42—Crown, 1, 8, 10—Maritime Law, 3—Solicitor, 11.

EXECUTION.

1. Exemptions—Homestead of debtor conveyed to his wife—Conveyance fraudulent—Lands not exempt—Title not in debtor—Order for sale of lands—Insufficiency of proof of registration of judgment:

Massey-Harris Co. v. *Warener*, 17 Occ. N. 409; 18 Occ. N. 33; 12 Man. L. R. 48.

2. *Fi. fa.* lands—Lien—Money charged upon land—Proceeding under R. S. O. 1887 c. 111, s. 23—Limitation of actions—Renewal of writ:

Neil v. *Almond*, 64; 29 O. R. 63.

3. Intituling—Validity—Protection of sheriff:

McAskill v. *Power*, 30 N. S. Reps. 189.

4. Order of Court of another Province—Winding-up Act, R. S. C. c. 129, s. 85—Production of certified copy—Entry of—Practice:

In re Dominion Cold Storage Co.—Lowrey's Case, 108; 18 P. R. 68.

5. Sale of goods under—Judgment afterwards set aside—Application for restitution—Subsequent title acquired by purchaser—Costs:

Whitford v. *Zinc*, 30 N. S. Reps. 193.

See Arrest, 11—Bankruptcy and Insolvency, 8, 9, 17—Bills of Sale and Chattel Mortgages, 1, 3—Company, 8, 9—Costs, 34—County Courts, 4—Criminal Law, 18—Crown Bond—Division Courts, 1—Equitable Execution—Evidence, 13—Husband and Wife, 3, 4—Judgment Debtor, 3—Landlord and Tenant, 7, 10—Mortgage, 7—Prohibition, 16—Receiver, 2—Sale of Land, 5—Sheriff, 1.

EXECUTORS AND ADMINISTRATORS.

1. Application by executor under Rule 938 (*a*)—Appeal to Divisional Court—Leave to appeal to Court of Appeal—Interest of executor—Reimbursement of costs—Security for costs:

In re Sherlock, 2; 18 P. R. 6.

2. Compensation of executors—Inconsistent provisions of will and codicil:

In re Bossi, 5 Brit. Col. L. R. 446.

3. Fraudulent exercise of power of sale—Advance of money to purchaser on mortgage—Constructive notice to mortgagees—Principal and agent—Evidence—Corroboration—Parties—Lien for taxes paid by mortgagees:

Graham v. *British Canadian L. & I. Co.*, 34, 315; 12 Man. L. R. 244.

4. Liability to account—Laches and acquiescence—Notice to claimants—Publication of—Requisites—R. S. O. c. 129, s. 38—Statute of Limitations—Administrator *de bonis non*:

Stewart v. *Snyder*, 407.

5. Will—Devise—Power to mortgage—Payment of debts—Trustee Act—Devolution of Estates Act:

Mercer v. *Neff*, 359; 29 O. R. 680.

See Administration, 1—Appeal, 21—Costs, 7—Devolution of Estates Act—Husband and Wife, 5—Master and Servant, 1—Money in Court, 1—Parties, 2, 7—Probate Courts, 2—Prohibition, 9—Railways and Railway Companies, 11—Receiver, 1—Will, 2, 12.

EXECUTORY CONTRACT.

See Sale of Goods, 3.

EXEMPTIONS.

See Attachment of Debts, 2—Execution, 1—Game—Prohibition, 16.

EXHIBITS.

See Judgment, 18.

EX PARTE JUDGMENT.

See County Courts, 5.

EX PARTE ORDER.

See Appeal, 10—Judgment Debtor, 2—Receiver, 1—Sale of Land, 5.

EXPERTS.

See Evidence, 9.

EXPROPRIATION OF LAND.

See Arbitration and Award, 2—Assessment and Taxes, 8—Municipal Corporations, 22—Railways and Railway Companies, 2, 3, 4—Statutes, 3.

EXTRADITION.

See Criminal Law, 8, 9.

FALSE ARREST.

See Arrest, 6.—Criminal Law, 19.

FALSE IMPRISONMENT.

See Arrest, 15.

FALSE REPRESENTATIONS.

See Company, 2—Deed, 8—Landlord and Tenant, 2—Pleading, 1.

FIERI FACIAS.

See Execution—Judgment Debtor, 3.

FINAL JUDGMENT.

See Amendment, 2—Appeal, 39, 40—Judgment, 5.

FINAL ORDER.

See Appeal, 28.

FINDINGS OF JURY.

See Deed, 6—Duress, 2—Jury—Municipal Corporations, 25, 28—Negligence, 1, 3—Trial.

FINE.

See Certiorari, 4—Criminal Law, 34—Police Magistrate, 1—Summary Conviction, 2—Trades-Unions.

FIRE.

1. Setting out—Damage by—Custom of agriculture—Reasonable precautions—Absence of negligence:

   Chaz v. *Les Cisterciens Reformes*, 271.

2. Setting out—Damage to timber on adjoining land—Master and servant—Act of servant—Responsibility of master:

   Sutherland v. *German*, 180.

See Landlord and Tenant, 13—Railways and Railway Companies, 8.

FIRE INSURANCE.

See Insurance, 1-5.

FIXTURES.

1. Machinery—Constructive annexation to freehold—Mortgagor and mortgagee:

Haggert v. *Town of Brampton*, 125; 28 S. C. R. 174.

2. Negotiations for sale—Intention to sever from freehold—No actual severance—Subsequent purchaser of freehold—Rights of:

Minhinnick v. *Jolly*, 135; 29 O. R. 238.

3. Plant and machinery—Mortgage—Agreement for security—Subsequent mortgage—Chattel mortgage—Constructive attachment—Notice—Priorities:

Canada Permanent L. & S. Co. v. *Traders' Bank of Canada*, 308; 29 O. R. 479.

4. Wooden building—Removability—Mode of use—Constructive attachment to soil—Mortgagor and mortgagee:

Miles v. *Ankatell*, 14, 391; 29 O. R. 21.

FORECLOSURE.

See Costs, 8—Mortgage, 2, 11—Pleading, 7.

FOREIGN COMPANY.

See Discovery, 12—Judgment Debtor, 1—Writ of Summons, 2.

FOREIGN ESTATE.

See Devolution of Estates Act, 3.

FOREIGN JUDGMENT.

See Judgment, 5.

FOREIGN LAW.

See Arrest, 3.

FOREIGN PARTNERSHIP.

See Partnership, 3.

FOREIGN PATENT.

See Patent of Invention.

FORESHORE.

See Trespass to Land, 2.

FORFEITURE.

See Insurance, 1—Mines and Minerals, 6, 9—Sale of Land, 3—Summary Conviction, 5.

FRAUD.

See Bankruptcy and Insolvency—Deed, 6, 8—Evidence, 5, 11—Executors and Administrators, 3—Husband and Wife, 2—Insurance, 21, 22—Judgment, 10—Mortgage, 11—Particulars, 2—Supreme Court of Canada, 2.

FRAUDULENT CONVEYANCE.

1. Attack by judgment creditor—Proof of consideration paid by alleged purchaser—Onus—Statute of Limitations—Concealed fraud:

Merchants' Bank v. *McKenzie*, 367.

2. Voluntary conveyance—Subsequent sale to innocent purchaser—Following proceeds—Attachment of debts:

Union Bank of Canada v. *Barbour*, 200; 12 Man. L. R. 166.

See Bankruptcy and Insolvency, 12—Execution, 1—Parties, 3.

FREE GRANT LANDS.

See Crown Lands, 1.

FUTURE RIGHTS.

See Appeal, 35, 46.

GAME.

British Columbia Game Protection Acts—Prohibition against purchasers having game in possession with intent to export—Limitation to game killed within the Province—Construction of statute—Exemption—Proviso or exception—Negativing—Burden of proof—Criminal charge:

Reg. v. *Strauss*, 5 Brit. Col. L. R. 486.

GAOL.

See Municipal Corporations, 12.

GAS COMPANY.

See Contract, 9.

GIFT.

1. Money in savings bank—Assignment to infant—Want of notice—Incompleteness:

Davidson v. *Cochrane*, 183, 220.

2. Parent and child—Evidence to support gift—Change of possession:

Rhodenhizer v. *Bolliver*, 31 N. S. Reps. 236.

See Husband and Wife, 6—Liquor License Act, 6—Will.

GOOD CAUSE.

See Costs, 6.

GRAND JURY.

See Criminal Law, 22.

GRANT.

See Landlord and Tenant, 15.

GUARANTY.

See Contract, 3—Writ of Summons, 3.

GUARDIAN.

See Discovery, 6—Infant, 5, 6—Settled Estates Act.

HABEAS CORPUS.

See Canada Temperance Act, 3—Costs, 9—Criminal Law, 1, 11, 34—Police Magistrate, 2—Supreme Court of Canada, 1.

HABENDUM.

See Deed, 3—Landlord and Tenant, 11.

HARBOUR.

See Maritime Law, 3—Water and Watercourses, 3.

HIGH COURT OF JUSTICE.

See Appeal, 26-32.

HIGHWAY.

See Assessment and Taxes, 9, 11—Constitutional Law, 5—Municipal Corporations, 13, 24-37—Railways and Railway Companies, 5, 9—Trespass to Land, 2—Way.

HIRE OF GOODS.

See Negligence, 2—Sale of Goods, 1, 2, 4.

HOMESTEAD.

See Execution, 1—Prohibition, 16.

HOTCHPOT.

See Distribution of Estates.

HUSBAND AND WIFE.

1. Alienation of husband's affections—Adultery of husband—Damages—Married Women's Property Act, R. S. O. c. 132:

Lellis v. *Lambert*, 17 Occ. N. 392; 24 A. R. 653.

2. Liability of wife—Separate estate—Husband employed in business as clerk:

Nichol v. *Gocher*, 245; 12 Man. L. R. 177.

HUSBAND AND WIFE—*Continued.*

3. Married woman doing business in her own name—Separate property—No evidence of fraud—Interpleader—Claimant of goods seized under execution against husband:

Malzard v. *Hart*, 29 N. S. Reps. 431; 27 S. C. R. 510.

4. Separate business of wife—Seizure of goods under execution against husband—Evidence—Divided success—Costs:

Slauenwhite v. *Archibald*, 30 N. S. Reps. 240.

5. Separate estate of wife—Husband's interest in—Renunciation—Rights of administrator of wife's estate—Evidence of renunciation—Construction of document:

Dorsey v. *Dorsey*, 261; 29 O. R. 475.

6. Separate estate of wife—Purchase of land—Conveyance to husband—Disclaimer of interest by him—Reduction into possession—Gift—Deed not delivered—Evidence of intention—Wife entitled against heirs of husband:

Routledge v. *Routledge*, 30 N. S. Reps. 151.

7. Separate property of wife—Conveyance—Contracts—C. S. N. B. c. 72:

Lea v. *Wallace*, 336; 28 S. C. R. 595.

See Arrest, 2—Criminal Law, 16, 17, 32—Estoppel—Execution, 1—Limitation of Actions, 1—Mortgage, 12—Water and Watercourses, 5.

HYPOTHEC.

See Mortgage, 7.

ICE.

See Municipal Corporations, 26—Water and Watercourses, 3.

ILLEGALITY.

See Contract, 2, 19—Covenant—Crown Lands, 3—Insurance, 21, 23—Landlord and Tenant, 12 — Municipal Corporations, 39.

IMPRISONMENT.

See Canada Temperance Act, 2—Criminal Law, 30, 34—Summary Conviction, 2, 10.

IMPROVEMENTS ON LAND.

Tenants in common—Allowances—Interest—Account—Practice—in Master's office:

In re Curry, Curry v. *Curry*, 235; 25 A. R. 267.

See Boundaries—Costs, 2—Landlord and Tenant, 5—Parent and Child.

INCOME.

See Assessment and Taxes, 5.

INDECENT ASSAULT.

See Evidence, 1.

INDEMNITY.

See Mortgage, 3, 13—Municipal Corporations, 32—Parties, 7, 8—Principal and Surety, 4—Prohibition, 11.

INDIAN.

Summary conviction—Giving and selling liquor to an Indian—Two offences—Stated case—Judgment on—Subsequent motion to quash conviction—*Res judicata*—Necessity for *certiorari*:

Reg. v. *Monaghan*, 45.

INDICTMENT.

See Criminal Law 20, 23, 27.

INDIGENT DEBTOR.

See Arrest, 9.

INFANT.

1. Custody—*Habeas corpus*—Age—Consent—Evidence—Welfare of child—Parent and child—Mother of illegitimate child—Putative father—Charitable institution:

In re Atanasse—Reg. v. *Redner*, 94; 6 Brit. Col. L. R. 73.

2. Custody—Parent and child—Paternal right—Maternal right—Separation of family:

In re Young, 363; 29 O. R. 665.

3. Custody—Parent and child—Rights of father—Discretion of Court:

In re Mathieu, 305; 29 O. R. 546.

4. Custody—Right of adopted father as against stranger—Welfare of child—Charitable institution:

In re Quai Shing, 6 Brit. Col. L. R. 86.

5. Guardianship — Person—Estate — Testamentary guardian — Natural guardian—Trustees—Education of infant:

In re Taylor, 17 Occ. N. 383; 1 N. B. Eq. Reps. 461.

6. Trust fund—Payment to guardian—Trustees under will—Application for advice—R. S. O. c. 110, s. 37—Payment into Court:

In re Mathers, 25; 18 P. R. 13.

See Costs, 9, 27—Discovery, 6—Gift, 1—Limitation of Actions, 4—Money in Court, 1—Negligence, 4—Settled Estates Act—Solicitor, 4.

INFORMATION.

See Canada Temperance Act, 1, 5—Summary Conviction, 9.

INFORMATION OF INTRUSION.

See Exchequer Court of Canada, 1.

INJUNCTION.

1. Interim order—Balance of convenience—Municipal corporations—By-laws regulating procedure:

Dwyre v. *City of Ottawa*, 168; 25 A. R. 121.

2. Interim order pending appeal from order dissolving injunction—Terms—Security—Proviso:

Pacific Investment Co. v. *Swann*, 97, 124.

3. Interim order—Undertaking for damages—Foreign plaintiff:

Deiap v. *Robinson*, 380; 18 P. R. 231.

4. Interim order—Undertaking for damages—Order made after hearing both parties:

New Vancouver Coal Co. v. *Esquimalt and Nanaimo R. W. Co.*, 6 Brit. Col. L. R. 222.

See Costs, 23—Covenant—Crown Lands, 2—Easement, 1—Equitable Execution, 1—Letters—Master and Servant, 7—Mortgage, 1—Municipal Corporations, 14—Nuisance—Street Railways, 1—Trade-Mark, 1—Trial, 11—Trusts and Trustees, 6—Water and Watercourses, 1, 5.

INNUENDO.

See Slander.

INSOLVENCY.

See Bankruptcy and Insolvency—Costs, 27.

INSPECTION.

See Discovery, 11—Sale of Goods, 5, 6.

INSURANCE.

1. Fire—Condition in policy—Breach—Change of interest—Chattel mortgage—Waiver of forfeiture—Recognition of risk after breach—Powers of agent:

Torrop v. *Imperial Fire Ins. Co.*, 34 N. B. Reps. 113; 26 S. C. R. 585; 16 Occ. N. 388.

2. Fire—Condition in policy—Notice of additional insurance—Liability of assured to give notice:

Commercial Union Ins. Co. v. *Temple*, 387.

INSURANCE—*Continued.*

3. Fire—Policy—Assignment—Cancellation — Mortgagee—Subsequent insurance—Double insurance—Proofs of loss:
   Morrow v. *Lancashire Ins. Co. of England*, 220; 29 O. R. 377.

4. Fire—Variation from statutory conditions—"Co-insurance" clause—"Not just and reasonable"—R. S. O. c. 203, s. 171:
   Eckhardt v. *Lancashire Ins. Co.*, 361; 29 O. R. 695.

5. Fire—Written contract by assured for sale of insured premises—Non-disclosure to insurers—Parol evidence to vary written contract—Verbal agreement that vendor should insure—Collateral contract — "Assigns" — Purchaser—Right of vendor to recover for loss by fire—Trustee for purchaser:
   Keefer v. *Phoenix Ins. Co. of Hartford*, 176; 29 O. R. 394.

6. Life—Action—Time—Ontario Insurance Act, 60 V. c. 36, s. 148 (2)—Enabling statute:
   Styles v. *The Supreme Council of the Royal Arcanum*, 19; 29 O. R. 38.

7. Life—Application for policy—Conditions and warranties—Indorsements on policy—Representations—Materiality—Good faith—Cancellation of policy—Return of premium 55 V. c. 39, s. 33 (2), (3):
   Jordan v. *Provincial Provident Institution*, 299; 28 S. C. R. 554.

8. Life—Apportionment by insured—Preferred beneficiary class—R. S. O. c. 103, s. 159, s.-s. 8:
   Burrell v. *Blackburn*, 193.

9. Life—Assignment of policy—Chose in action—Notice to insurers—Mistake as to particular policy:
   Crawford v. *Canada Life Assurance Co.*, 17 Occ. N. 395; 24 A. R. 643.

10. Life—Benefit certificate—Assignment of certificate by member to stranger—Valuable consideration—Action for damages for member's resignation:
    Landy v. *Nolan*, 415.

11. Life—Benefit—Certificate—Change in rules of society—Classes of beneficiaries:
    Yelland v. *Yelland*, 130; 25 A. R. 91.

12. Life—Benefit certificate—Designation of persons to be benefitted—Will:
    Babe v. *Board of Trade of Toronto*, 405.

INSURANCE—*Continued.*

13. Life—Benefit certificate—Mistake as to age—Misrepresentation—Good faith—52 V. c. 32, s. 6:

Cerri v. *Ancient Order of Foresters*, 53; 25 A. R. 22.

14. Life—Benefit certificate—Non-compliance with rules as to initiation—Subordinate councils—Power to waive initiation—Relief fund:

Hoefner v. *Canadian Order of Chosen Friends*, 86; 29 O. R. 125.

15. Life—Benefit certificate—"Ordinary beneficiary"—Reapportionment by will—Validity—60 V. c. 36, ss. 151, 159, 160—Retroactivity:

Videan v. *Westover*, 17; 29 O. R. 1.

16. Life—Benefit certificate — Suspension—Reinstatement—"Renewed contract"—55 V. c. 39, s. 33:

Long v. *Ancient Order of United Workmen*, 129; 25 A. R. 147.

17. Life—Benefit of children—Alteration of apportionment, by will—Gift to others and to grandchildren—Validity of, as against creditors—Cancellation and reissue of policies:

McIntyre v. *Silcox*, 344; 29 O. R. 593.

18. Life—Benefit society—Liquidation—Master's report—Practice—Notice of filing—Appeal—Total disability benefit—Repeal of provisions as to—Assessments—Non-payment—Suspension—"Fixed dates"—Time—Notice:

In re Supreme Legion Select Knights of Canada—Cunningham's Case, 380; 29 O. R. 708.

19. Life—Construction of policy—Designation of beneficiary—Insurance for benefit of wife—R. S. O. 1887 c. 136:

Fisher v. *Fisher*, 131; 25 A. R. 108.

20. Life—Declaration by will in favour of children—Identification of policies:

In re Cheesbrough, 23.

21. Life—Insurable interest—Wager policy—Pleading—Allegation of fraud—Charge not sustained—Costs:

Mutual Life Ass. Co. of New York v. *Anderson*, 17 Occ. N. 342; 1 N. B. Eq. Reps. 466.

22. Life—Loss payable to assured's wife—Assignment without her consent—Fraud:

Gunter v. *Williams*, 17 Occ. N. 125; 1 N. B. Eq. Reps. 401.

INSURANCE—*Continued.*

23. Life—Wagering policy—Nullity—Waiver of illegality—Insurable interest—Estoppel:

Manufacturers' Life Ins. Co. v. *Anctil*, 28 S. C. R. 103.

24. Marine—Acceptance of abandonment—Duty of company undertaking to repair—"Boston clause"—Owner prejudiced—Jury—Case for—Authority of master and consignee determined by arrival of special agent—Right of owner to inspect—Proofs of loss—Admission of right to recover—Right of Court to supply finding—Question to jury—Formal offer of, necessary—Substantial wrong or miscarriage—Setting aside verdict:

McLeod v. *Insurance Co. of North America*, 30 N. S. Reps. 480.

25. Marine—Action for part loss on cargo—Circumstances supporting finding that vessel stranded—Case for jury:

Rudolf v. *British and Foreign Marine Ins. Co.*, 30 N. S. Reps. 380; 28 S. C. R. 607.

26. Marine—Application for insurance—Question as to person for whom effected—Finding of trial Judge—Non-interference with—Question in application not answered—Acceptance of risk with blank not filled up—Waiver—Insurance on disbursements—Subject-matter of insurance—Reasonable certainty:

Cunard v. *Nova Scotia Marine Ins. Co.*, 29 N. S. Reps. 409.

27. Marine—Construction of policy—Condition—Season of navigation—Extra risk:

Great Northern Transit Co. v. *Alliance Ins. Co.*, 393; 25 A. R. 393.

See Appeal, 47—Assessment and Taxes, 5—Benefit Societies—Chose in Action, 1—Criminal Law, 5—Evidence, 11—Revenue, 2—Statutes, 10.

INTEREST.

See Arbitration and Award, 1—Bills of Exchange and Promissory Notes, 4—Crown, 5, 6—Division Courts, 6—Improvements on Land—Mortgage, 4, 5, 6, 10—Municipal Corporations, 2, 3—Payment—Prohibition, 6, 11—Trusts and Trustees, 1—Will, 8.

INTERIM ALIMONY.

See Alimony, 1.

INTERIM INJUNCTION.

See Injunction.

INTERLOCUTORY COSTS.

See Costs, 35.

INTERLOCUTORY JUDGMENT.

See Judgment, 1, 6, 13—Pleading, 9.

INTERLOCUTORY MOTION.

See Costs, 4, 11.

INTERPLEADER.

See Appeal, 18, 28—Contract, 5—Husband and Wife, 3.

INTOXICATING LIQUORS.

See Canada Temperance Act—Indian—Landlord and Tenant, 12—Liquor License Act.

IRREGULARITY.

See Appeal, 9—Judgment, 13, 17—Notice of Trial, 2—Pleading, 9, 12—Receiver, 3—Writ of Summons, 1.

ISSUE.

See Company, 9—Pleading, 7—Settlement of Action.

JOINDER.

Of Claims—See Exchequer Court of Canada, 1.

Of Causes of Action—See Mortgage, 11—Pleading, 7.

Of Parties—See Parties.

JOINT RETAINER.

See Solicitor, 10.

JOINT STOCK COMPANY.

See Company.

JOINT TORT FEASORS.

See Parties, 4.

JUDGE IN CHAMBERS.

See Company, 16, 19—Costs, 38, 39—Division Courts, 2—Judgment, 14—Jury Notice, 2—Stay of Proceedings.

JUDGE IN EQUITY.

See Costs, 14.

JUDGE OF PROBATE COURT.

See Probate Courts, 1.

JUDGMENT.

1. Action on bond—8 & 9 Wm. III. c. 11—Rule 580—Procedure—Penalty—Assessment of damages—Motion for judgment Rule 593:

Star Life Assurance Society v. *Southgate*, 229; 18 P. R. 151.

2. Appeal from—Judgment pronounced but not entered—Practice:

Lang v. *City of Victoria*, 6 Brit. Col. L. R. 117.

3. Default of defence—Indorsement on writ in lieu of statement of claim—Sufficiency of special indorsement:

Hassard v. *Riley*, 6 Brit. Col. L. R. 167.

4. Delay in issuing—Right of unsuccessful party to issue or compel issue of—Appeal—Effect of judgment pronounced, but not issued:

Lang v. *City of Victoria*, 96; 6 Brit. Col. L. R. 104.

5. Foreign judgment—Action on—Arrears of alimony—Final judgment:

Hadden v. *Hadden*, 331.

6. Interlocutory judgment—Motion to set aside—Leave to defend—Defence on merits—Discretion of Judge—Q. B. Act, 1895, Rules 334*a*, 665:

Moore v. *Kennedy*, 204; 12 Man. L. R. 173.

7. Motion to set aside judgment entered on default—Insufficient service of process—Leave to defend—Judgment to stand:

Ritz v. *Schmidt*, 152; 12 Man. L. R. 138.

8. Motion to vary as to costs—"Mere slip"—Laches:

Palgrave Gold Mining Co. v. *McMillan*, 31 N. S. Reps. 196.

9. Partnership—Joint liability—Judgment against one partner—Cause of action against the other not extinguished—Setting aside judgment—Leave to defend—Merits:

Zweig v. *Morrissey*, 5 Brit. Col. L. R. 484.

10. Petition to set aside judgment of Supreme Court of Canada—Discovery of deed fraudulently concealed—Jurisdiction:

Durocher v. *Durocher*, 17 Occ. N. 391; 27 S. C. R. 634.

11. Setting aside judgment by default of defence—Affidavit—Sufficiency of—Merits—Discretion—Information and belief—Grounds of belief:

Piper v. *Kings' Dyspepsia Cure Co.*, 30 N. S. Reps. 429.

JUDGMENT—*Continued.*

12. Setting aside judgment by default of defence—Good defence on the merits—Non-disclosure of merits—Discretion—Service of defence by mailing—Sufficiency of :

Bigelow v. *Doherty*, 30 N. S. Reps. 393.

13. Specific performance and damages—Interlocutory judgment—Irregularity—Subsequent delivery of statement of claim —Assessment of damages:

Stuart v. *McVicar*, 403; 18 P. R. 250.

14. Summary judgment—Action on bill of exchange—Defence that plaintiff not legal holder—Affidavit of defendant—Information and belief—Discretion of Judge at Chambers —Interference by Court—Further affidavits received on appeal—Conditional leave to defend—Costs:

Banque d'Hochelaga v. *Maritime Railway News Co.*, 29 N. S. Reps. 358.

15. Summary judgment—Action on promissory note—Escrow—Holder in due course—Leave to defend:

Flour City Bank v. *Connery*, 367; 12 Man. L. R. 305.

16. Summary judgment—Application for—Dismissal of—Leave to defend—Time for delivery of defence:

Pounder v. *Corner*, 6 Brit. Col. L. R. 177.

17. Summary judgment—Motion to set aside—Irregularity—Application for judgment by notice instead of summons—Slip or error—Duty of party objecting:

Sands v. *Fisher*, 30 N. S. Reps. 185.

18. Summary judgment—Order XIV., Rule 1—Requirements of—Service of copy of exhibit to affidavit:

Barker v. *Lawrence*, 5 Brit. Col. L. R. 460.

19. Trial adjourned into vacation—" Pending trial "—Rule 736 (*d*) —Setting aside judgment:

Green v. *Stussi*, 6 Brit. Col. L. R. 193.

See Alimony, 1—Amendment, 1, 2—Appeal, 11, 14, 26, 31, 40—Arbitration and Award, 1—Certiorari, 3—Company, 8, 9—Costs, 8, 11, 12, 31, 32—County Courts, 5, 6—Damages—Division Courts, 1, 2—Duress, 2—Evidence, 4—Exchequer Court of Canada, 1—Execution, 1, 5—Indian—Landlord and Tenant, 1—Law Stamps—Money in Court, 2—Mortgage, 7—Principal and Surety, 4—Probate Courts, 1—Prohibition, 8—Receiver, 2—Registry Laws, 1, 2—Sale of Goods, 1—Sale of Land, 3—Solicitor, 3, 4, 5—Supreme Court of Canada, 2—Trial, 3, 7, 9—Writ of Summons, 4.

LACHES.

See Executors and Administrators, 4—Judgment, 4, 8—Receiver, 3.

LANDLORD AND TENANT.

1. Action for rent and possession—Parties—Judgment for possession against tenant—Effect of, on sub-tenants:

Synod of the Diocese of Toronto v. *Fisken*, 399.

2. Agreement for termination of tenancy—"Disposing of" demised premises—Notice to quit—False representation—Covenant for quiet enjoyment—Disturbance—Breach—Acquiescence—Damages:

Gold Medal Furniture Co. v. *Lumbers*, 64; 29 O. R. 75.

3. Assignment of tenant for benefit of creditors—Future rent—Preferential lien of landlord—Distress—R. S. O. c. 170, s. 34:

Lazier v. *Henderson*, 358; 29 O. R. 673.

4. Co-tenants—Release of one—Agreement—Consideration:

Donaldson v. *Wherry*, 306; 29 O. R. 552.

5. Covenant for renewal—Compensation for improvements—Time for election to renew:

Ward v. *City of Toronto*, 360; 29 O. R. 729.

6. —Distress for rent—Delay in sale—Distress left on demised premises — Bond by tenant — Abandonment — Goods in *custodia legis*:

Anderson v. *Henry*, 378; 29 O. R. 719.

7. Distress for rent—Goods *in custodia legis*—Division Court execution—Bailiff's man in charge—Voluntary withdrawal:

Cross v. *Davidson*, 231.

8. Distress for rent—Impounding of hired goods—Placing in custody of tenant's wife on premises—Use of goods by tenant's family—Validity of distress as against real owner of goods:

Dimock v. *Miller*, 30 N. S. Reps. 74.

9. Distress for rent—Tenant in common with lessor—Right to distrain—Use and occupation—Nominal damages—Costs:

Lowther v. *Johnson*, 281.

10. Lease—Agreement as to vacancy—Condition—Breach—Avoidance of lease by lessor—Execution—Company—Corporate seal:

Palmer v. *Mail Printing Co.*, 62; 28 O. R. 656.

LANDLORD AND TENANT—*Continued.*

11. Lease—Construction — Habendum — Subsequent proviso—Repugnancy:

Weller v. *Carnew*, 178; 29 O. R. 400.

12. Lease of house for an unlawful purpose—Action to recover rent—Sale of liquor contrary to Canada Temperance Act —Illegality of lease:

Vanbuskirk v. *McNaughton*, 34 N. B. Reps. 125.

13. Loss by fire—Negligence—Legal presumption—Rebuttal of—Onus of proof—Lease, construction of—Covenant to return premises in good order—Act 1629, C. C.:

Klock v. *Lindsay*, 300; 28 S. C. R. 453.

14. Overholding Tenants Act, R. S. M. c. 112—Colour of right:

In re London and Ontario Investment Co. and McKittrick, 75.

15. Way—Express grant—Mode of user—Interference with:

Butchart v. *Doyle*, 17 Occ. N. 398; 24 A. R. 615.

See Bankruptcy and Insolvency, 6, 14—Company, 7—Easement, 2—Sale of Land, 6.

LANDS INJURIOUSLY AFFECTED.

See Municipal Corporations, 2, 19, 38—Railways and Railway Companies, 6.

LARCENY.

See Criminal Law, 9, 12.

LAW STAMPS.

Unstamped summons in County Court—Power of Court to affix stamps after judgment—"Knowingly and wilfully" violating Act:

Aldrich v. *Nest Egg Co.*, 6 Brit. Col. L. R. 53.

See Arrest, 3.

LEASE.

See Company, 7—Landlord and Tenant, 10-13—Limitation of Actions, 4—Mines and Minerals, 6, 9—Mortgage, 8—Sale of Goods, 2—Vendor and Purchaser, 3—Way, 6.

LEAVE TO APPEAL.

See Appeal, 6, 7, 16, 21, 23, 25, 33, 47.

LEGACY.

See Administration, 1—Will.

LETTERS.

Publication of—Breach of duty as clerk—Injunction—Interference with criminal justice:

Laidlaw v. *Lear*, 400.

See Distress—Master and Servant, 4.

LETTERS PROBATE.

See Probate Courts, 2

LIBEL.

1. Evidence—Admissibility—Opinion of witnesses as to person referred to in writing complained of—Failure of defendant to appear at trial—New trial—Terms—Payment of costs—Defence—Offer of apology—Admission of publication—Nominal damages:

Kirkpatrick v. *Mills*, 30 N. S. Reps. 426.

2. Evidence—Setting aside verdict for defendant—New trial—Fair comment—Public official—Charge of corrupt motives:

Munro v. *Quigley*, 30 N. S. Reps. 360.

3. Malice—Privilege—Evidence:

Beaulieu v. *Cochrane*, 108, 338; 29 O. R. 151, 598.

4. Newspaper—Solicitor for municipality—Comments on conduct of—Belief in truth of statements published—Misdirection—New trial:

Douglas v. *Stephenson*, 339; 29 O. R. 616.

5. Privilege—Malice—Absence of evidence of:

Beaulieu v. *Cochrane*, 108, 338; 29 O. R. 151, 598.

6. Publication—Post card sent by mail:

Motherstill v. *Young*, 5.

See Costs, 28, 29—Libel and Slander—Slander.

LIBEL AND SLANDER.

Charging candidate for Parliament with corruption—Public interest—Privilege—Justification—Challenging action—Costs:

Gauthier v. *Jeannotte*, 28 S. C. R. 590.

LICENSE.

See Crown Lands, 3—Municipal Corporations, 6, 7, 39, 41—Water and Watercourses, 5.

LICENSE INSPECTOR.

See Justice of the Peace, 3.

LIEN.

1. Trainer's lien on racehorse—Use by owner—Right of continuing possession—Loss of lien by parting with the possession—Resumption of possession—Revivor of lien:
Reilly v. *McIlmurray*, 105; 29 O. R. 167.

2. Vendor's lien — Performance of agreement — Tenants in common:
Ward v. *Wilbur*, 233; 25 A. R. 262.

3. Woodmen's Lien Act, 1894—Time for filing claim—Colourable return to work:
Guimond v. *Belanger*, 33 N. B. Reps. 589.

See Assessment and Taxes, 4, 6—Bankruptcy and Insolvency, 7—Bond—Costs, 36—Crown Bond—Execution, 2—Executors and Administrators, 3—Landlord and Tenant, 3—Mechanics' Liens—Mortgage, 8, 11—Sale of Goods, 1, 2, 4—Ship, 2—Solicitor, 4, 7.

LIFE ESTATE.

See Will, 4.

LIFE INSURANCE.

See Benefit Societies—Chose in Action, 1—Evidence, 11—Insurance, 6-23.

LIMITATION OF ACTIONS.

1. Action for price of goods—Payment made on account by defendant's wife—Implied authority of wife to bind husband—Revocation of:
Robertson v. *McKeigan*, 29 N. S. Reps. 315.

2. Ejectment—Tenancy at will—Commencement of statutory period:
Miller v. *Batty*, 86.

3. Exclusive possession of land—Receipt of profits—Pasture for cattle:
Rennie v. *Frame*, 342; 29 O. R. 586.

4. Infant heir-at-law—Entry—Evidence of lease — Estoppel — Adverse title—Overholding lessees—Tenants in common:
Brock v. *Benness*, 265; 29 O. R. 468.

See Bills of Exchange and Promissory Notes, 6—Contract, 17—Easement, 2—Execution, 2—Executors and Administrators, 4—Fraudulent Conveyance, 1—Municipal Corporations, 22—Parties, 3—Railways and Railway Companies, 1—Solicitor, 1—Statutes, 2—Trespass to Land, 1—Way, 2, 5—Will, 15.

LIQUIDATOR.

See Company, 14, 16.

LIQUOR LICENSE ACT.

1. Manitoba—Second offence—Sufficiency of evidence—No evidence to prove previous conviction—Bias of magistrate:

   Reg. v. *Herrell*, 297; 12 Man. L. R. 198.

2. New Brunswick—Conviction under—Appeal to County Court Judge—Evidence on appeal:

   Ex p. Abel, 34 N. B. Reps. 121.

3. Nova Scotia—Conviction for violation of—Stipendiary magistrate—Disqualification—Bias—Relationship to informant—*Certiorari*—Absence of affidavit required by statute—Objection after return of writ—Objection to form of conviction not a ground for quashing:

   Reg. v. *Major*, 29 N. S. Reps. 373.

4. Nova Scotia—Offence against—Conviction for—Evidence of informant—Jurisdiction of convicting magistrate—Refusal of *certiorari*:

   Reg. v. *Stevens*, 31 N. S. Reps. 124.

5. Ontario—Keeping liquor for sale—Summary conviction of steward of club—Evidence—Charter of club—Prohibition as to intoxicating liquors—Motion to quash conviction—Right of Court to look at evidence when conviction valid on its face:

   Reg. v. *Hughes*, 106; 29 O. R. 179.

6. Ontario—R. S. O. 1887 c. 194, s. 54—"Sale or other disposal"—Gift—Treating on Sunday—Construction of statute—Summary conviction:

   Reg. v. *Walsh*, 10; 29 O. R. 36.

See Justice of the Peace—Summary Conviction, 3, 6.

LIS PENDENS.

Motion to vacate—Land Registry Act, s. 85—Damages not a complete compensation:

Towne v. *Brighouse*, 6 Brit. Col. L. R. 225.

See Action, 2—Mortgage, 1.

LITIGIOUS RIGHTS.

See Deed, 1.

LOCAL JUDGE.

See Trial, 9.

LORD CAMPBELL'S ACT.

See Master and Servant, 1.

LORD'S DAY.

See Municipal Corporations, 8—Sunday.

LORD'S DAY ACT.

See Constitutional Law, 4.

LUNACY.

See Costs, 10.

MACHINERY.

See Fixtures, 1, 3—Negligence, 4—Sale of Goods, 7.

MAINTENANCE.

See Bastard—Bond—Contract, 17—Money in Court, 1—Parent and Child.

MALICIOUS PROSECUTION.

1. Malice—Resentment—Motive of prosecution—Belief in truth of charge laid—Negativing motive—Direction to jury—Expression of opinion—Mistake in stating effect of evidence—Not ground for setting aside verdict or for new trial:

   Hawkins v. *Snow*, 29 N. S. Reps. 444.

2. Reasonable and probable cause—Advice of counsel—Malice—Jury:

   St. Denis v. *Shoultz*, 129; 25 A. R. 131.

3. Reasonable and probable cause—Evidence of—Charge of conspiracy:

   Moore v. *Carberry*, 339.

4. Reasonable and probable cause—Finding of jury—Honest belief—Reasonable care—Malice—Burden of proof—Nonsuit:

   Malcolm v. *Perth Mutual Fire Ins. Co.*, 263, 378; 29 O. R. 406, 717.

See New Trial, 3.

MALPRACTICE.

See Medical Practitioner, 2.

MANDAMUS.

See Assessment and Taxes, 12—Division Courts, 5—Municipal Corporations, 20—Street Railways, 1.

MARINE INSURANCE.

See Insurance, 24-27.

MARITIME LAW.

1. Affreightment—Carriers—Charterparty—Privity of contract—Negligence—Stowage—Fragile goods—Bill of lading—Condition—Notice—Contract against liability for fault of servant:

   Glengoil S. S. Co. v. *Pilkington*; *Glengoil S. S. Co.* v. *Ferguson*, 126; 28 S. C. R. 146.

2. Collision—Rules 16 and 20 (1884):

   Inchmaree S. S. Co. v. *The "Astrid,"* 389.

3. Yacht dragging anchor in public harbour—Salvage—Jurisdiction of Exchequer Court—R. S. C. c. 81, s. 44:

   Lahey v. *The "Maple Leaf,"* 390.

See Ship.

MARKETS.

See Municipal Corporations, 6, 41.

MARRIAGE.

See Criminal Law, 16, 17.

MARRIED WOMAN.

See Estoppel—Husband and Wife—Mortgage, 12.

MASTER AND SERVANT.

1. Action under Lord Campbell's Act and Workmen's Compensation Act—Parties—Widow as plaintiff—Administrator refusing to join—Allegation that deceased was a "workman"—Pleading—Demurrer:

   Pearson v. *Canadian Pacific R. W. Co.*, 123; 12 Man. L. R. 112.

2. Damages—Tort—Wrongful act of servant—Scope of employment—Street railways—Motorman pushing newsboy off car:

   Coll v. *Toronto R. W. Co.*, 50; 25 A. R. 55.

3. Death of servant—Negligence of master—Insulation of electric wires—Cause of death:

   Citizens' Light and Power Co. v. *Lepitre*, 350.

4. Dismissal of servant—Contract of hiring—Statute of Frauds—Substituted contract—Pleading—Amendment—Parol evidence to supplement letter—New trial:

   Strong v. *Bent*, 31 N. S. Reps. 1.

MASTER AND SERVANT—*Continued.*

5. Dismissal of servant—Contract of hiring—Term—Weekly hiring—Notice necessary to terminate—Contradictory evidence—Finding of trial Judge—Non-interference on appeal—Servant entering into employment of defendant's successor in business—Evidence—Burden of proof:

   Holloway v. *Lindberg*, 29 N. S. Reps. 460; 30 N. S. Reps. 421.

6. Dismissal of servant—Indefinite hiring—Temporary arrangement—Evidence—Notice:

   Bain v. *Anderson*, 284; 28 S. C. R. 481.

7. Duty of clerk—Implied contract as to secrecy—Publication of letters—Injunction against:

   Laidlaw v. *Lear*, 400.

8. Negligence—Cause of accident—Conjecture—Fault of fellow-servant—Absence of proof—Presumption—Master's liability:

   Dominion Cartridge Co. v. *Cairns*, 275; 28 S. C. R. 361.

9. Negligence — Cause of accident — Conjecture — Probability—Evidence:

   Canada Paint Co. v. *Trainor*, 277; 28 S. C. R. 352.

10. Negligence—Cause of accident—Contributory negligence—Master's liability:

    Burland v. *Lee*, 275; 28 S. C. R. 348.

11. Negligence—Injury to servant—Master's liability—Contributory negligence—Appeal—Findings of Courts below:

    Bouchard v. *George Matthews Co.*, 28 S. C. R. 580.

12. Negligence—Workman's death—How occasioned—Evidence—Jury—Conjecture:

    Kervin v. *Canadian Coloured Cotton Mills Co.*, 47: 25 A. R. 36.

See Company, 1—Crown, 8, 10—Fire, 2—Maritime Law, 1—Municipal Corporations, 42—Negligence, 1, 2.

MASTER IN CHAMBERS.

See Municipal Elections.

MASTER'S OFFICE.

See Account.

MASTER'S REPORT.

See Appeal, 32.

MEASURE OF DAMAGES.

See Damages, 5, 6.

MECHANICS' LIENS.

1. Affidavit for lien —Sufficiency of—Labour and materials not discriminated:

Weller v. *Shupe*, 6 Brit. Col. L. R. 58.

2. Proceedings to enforce—Forum—High Court—Jurisdiction of County Court Judge—Intituling of proceedings:

In re Ribble v. *Aldwell*, 59.

MEDICAL PRACTITIONER.

1. Agreement for sale of practice—Unregistered physician:

Ryan v. *McNichol*, 1 N. B. Eq. Reps. 487.

2. Malpractice—Negligence—Pleading — Evidence — Improper admission of—New trial—Degree of skill required of surgeon:

Zirkler v. *Robertson*, 30 N. S. Reps. 61.

See Covenant.

MENACES.

See Criminal Law, 4, 13.

MERGER.

See Mortgage, 8.

MESNE PROFITS.

See Exchequer Court of Canada, 1.

MINES AND MINERALS.

1. Action attacking location—Time for bringing—Extension after lapse—Circumstances justifying—Mineral Act, 1896, s. 37:

In re "Golden Butterfly Fraction" Mineral Claim, 5 Brit. Col. L. R. 445.

2. Agreement for sale of mining rights—Action for price—Damages for breach:

Weatherbe v. *Whitney*, 30 N. S. Reps. 104.

3. Mineral Act, B.C., 1894, s. 4—Location of claim—Invalidity—Initial post in foreign country:

Connell v. *Madden*, 6 Brit. Col. L. R. 76.

4. Mineral claim—Action to enforce against adverse claimant—Joinder of other claimants to same mining ground:

Dunlop v. *Haney*, 6 Brit. Col. L. R. 169.

MINES AND MINERALS—*Continued.*

5. Mining law of British Columbia—Action to enforce adverse claim—Abandonment of—Setting aside adverse claim—Application made in action—Practice:

Troup v. *Kilbourne*, 5 Brit. L. R. 547.

6. Mining lease—Improvident issue of—Omission of provisions required by statute—Effect of—Voidable, not void—How attacked—Forfeiture—Court will not assume facts in favour of:

In re Wier, 31 N. S. Reps. 97.

7. Mining location—Validity of—Error—Mineral Act, 1896, B. C. ss. 16, 19, 27—Priorities between locators:

Francoeur v. *English*, 6 Brit. Col. L. R. 63.

8. Mining partnership—Liabilities—Mineral Act, C. S. B. C. 1888, c. 82, s. 126—"Foreman"—Estoppel by condust:

Gray v. *McCallum*, 5 Brit. Col. L. R. 462.

9. Nova Scotia Mines Act, R. S. c. 7, and amendments—Lease of mining areas—Conditions—Payment of rent in advance—Forfeiture for default—Application of payments by statutes—Necessity for judgment of forfeiture—Notice of forfeiture—Construction of statutes—Reading plural for singular—Mines office register—Entry of name of relator—Date of lease—*Falsa demonstratio*—Estoppel—Amendment:

Attorney-General v. *Temple*, 29 N. S. Reps. 279.

See Contract, 4—Statutes 1, 15.

MINING COMPANY.

See Principal and Agent, 1.

MINING LANDS AND LOCATIONS.

See Mines and Minerals.

MINISTER OF CUSTOMS.

See Exchequer Court of Canda, 2.

MISDIRECTION.

See Criminal Law, 19—Damages, 5—Libel, 4—Malicious Prosecution, 1—Negligence, 1, 3—New Trial, 3—Trial, 3, 5, 10.

MISREPRESENTATIONS.

See Company, 2—Deed, 8—Insurance, 13—Landlord and Tenant, 2—Pleading, 1—Vendor and Purchaser, 2.

MISTAKE.

See Contract, 7—Deed, 8—Insurance, 13—Mines and Minerals, 7—Municipal Corporations, 39—Vendor and Purchaser, 1.

MONEY IN COURT.

1. Payment in of fund in hands of executor out of which infants are entitled to maintenance:

In re Humphries, Mortimer v. *Humphries*, 382.

2. Payment in with defence—Election to take out—Time—Extension—Judgment—Rules 353, 419, 424:

Magann v. *Ferguson*, 356; 18 P. R. 201.

See Prohibition, 13—Receiver, 3.

MORTGAGE.

1. Action to set aside—Registration of *lis pendens*—Injunction to restrain parting with mortgage—Necessity for:

Sell v. *Smith*, 407.

2. Foreclosure—Account—Bonus for indorsing note—Payment of—Appeal by subsequent incumbrancer:

Phillipp v. *Prout*, 149; 12 Man. L. R. 143.

3. Indemnity—Purchase subject to mortgage—Implied covenant—Assignment of right to payment:

Glenn v. *Scott*, 162.

4. Interest—Redemption—R. S. O. c. 111, s. 17:

McMicking v. *Gibbons*, 17 Occ. N. 394; 24 A. R. 586.

5. Interest *post diem*—Rate of:

Cunningham v. *Hamilton*, 5 Brit. Col. L. R. 539.

6. Interest *post diem*—Rate of:

King v. *Keith*, 422.

7. Judicial authorization—Mortgage by institute in possession and curator to substitution—Mortgage money expended in rebuilding—Default in payment of mortgage—Judgment against institute—Curator not a party—Sale of mortgaged land under execution—Estate taken by purchaser—*Res judicata*—Estoppel—Registry laws—Hypothecs and charges:

Vadeboncoeur v. *City of Montreal*, 386.

8. Leasehold—Acquisition of reversion by mortgagor—Liability for payment of mortgage—Lien—Priorities—Merger:

Building and Loan Assn. v. *McKenzie*, 17 Occ. N. 394; 18 Occ. N. 283; 24 A. R. 599; 28 S. C. R. 407.

MORTGAGE—*Continued.*

9. Power of sale—Improvident exercise of—Sale at under-value —Damages:

Carruthers v. *Hamilton Provident and Loan Society*, 39, 121; 12 Man. L. R. 60.

10. Power of sale—Purchase by mortgagee—Subsequent valid exercise—Surplus after paying mortgage—Mortgagee in possession—Account—Interest—Costs of special case:

Mitchell v. *Kinnear*, 17 Occ. N. 289; 1 N. B. Eq. Reps. 427.

11. Purchase of land at tax sale by mortgagor's wife—Fraudulent schemes—Foreclosure—Liability of assignee of purchaser at tax sale—Lien for taxes paid—Pleading—Joinder of causes of action—Burden of proof:

Day v. *Rutledge*, 150, 315; 12 Man. L. R. 290.

12. Purchase of lands subject to—Married woman purchaser—Covenant to pay off mortgage—Non-execution of deed containing covenant—Obligation to pay mortgage—Accepting benefits of deed—Enforcement of covenant by assignee—Separate estate:

Small v. *Thompson*, 211; 28 S. C. R. 219.

13. Purchase of lands subject to—Obligation of purchaser to indemnify vendor against covenant for payment—Assignment of obligation—Right of action by assignee:

Maloney v. *Campbell*, 210; 28 S. C. R. 228.

14. Second mortgagee and owner of equity of redemption—Right to recover value of timber cut:

Sutherland v. *Dangerfield*, 18.

See Appeal 49—Assessment and Taxes, 6—Bankruptcy and Insolvency, 1—Company, 12—Crown Bond—Devolution of Estates Act, 2—Distress—Dower, 1—Executors and Administrators, 3, 5—Fixtures, 1, 3, 4—Insurance, 3—Municipal Corporations, 3, 43—Parties, 10—Receiver, 2—Registry Laws, 1, 3—Ship, 1—Stay of Proceedings.

MORTMAIN.

See Will.

MUNICIPAL CORPORATIONS.

1. Arbitration and award—Appeal—Time—Filing—Notice:

In re McLellan and Township of Chinguacousy, 404; 18 P. P. R. 246.

MUNICIPAL CORPORATIONS—*Continued.*

2. Arbitration and award—Lands injuriously affected—Compensation—Interest:
In re Leak and City of Toronto, 17 Occ. N. 191; 18 Occ. N. 355; 29 O. R. 685.

3. Arbitration and award—Taking over waterworks—Parties to arbitration—Mortgagees—Value of works—Interest:
In re Town of Cornwall and Cornwall Waterworks Co., 222; 29 O. R. 350.

4. Borrowing powers—Current expenditure—Inquiry by lenders—Repayment of money lent—Action to restrain:
Fitzgerald v. *Molsons Bank*, 61; 29 O. R. 105.

5. By-law—Approval by ratepayers—Majority in number and value:
Town of Chicoutimi v. *Price*, 352.

6. By-law—Auctioneer—"Regulating and governing"—Prohibiting—Markets—Regulation of:
Bollander v. *City of Ottawa*, 401.

7. By-law—Licensing powers—Regulation of dairies—Inspection—Reasonableness of by-law—Application to quash:
In re Taylor and City of Winnipeg, 31; 12 Man. L. R. 18.

8. By-law—Lord's Day observance—Unreasonableness:
Reg. v. *Petersky*, 5 Brit. Col. L. R. 549.

9. By-law—Motion to quash—Time—Last day for moving falling on a holiday:
In re Nelson City By-law No. 11, 6 Brit. Col. L. R. 163.

10. By-law — Registration — Non-conformity with plans — Invalidity—"Instrument"—Notice:
In re Henderson and City of Toronto, 362; 29 O. R. 669.

11. By-law—Repeal—Public Schools Act, R. S. O. c. 292, ss. 38, 39—Alteration of school sections—Township council—County council—Appeal:
In re Powers and Township of Chatham, 327; 29 O. R. 571.

12. City separated from county—Maintenance of court house and gaol—Care and maintenance of prisoners—55 V. c. 42, ss. 397, 404, 469, 473:
County of Carleton v. *City of Ottawa*, 28 S. C. R. 606.

13. Closing streets—By-law—Notice of intention to pass—Absence of notice as to day on which to be considered—Invalidity of by-law—Motion to quash—Discretion—Acquiescence—Estoppel:
In re Campbell and Village of Southampton, 119.

MUNICIPAL CORPORATIONS—*Continued.*

14. Corporation works—Resolution of council fixing rate of wages —*Intra vires*—*Bona fides*—Discretion—Injunction:

Kelly v. *City of Winnipeg*, 92, 109; 12 Man. L. R. 87.

15. Drainage—Assessment—Extra cost of works—R. S. O. 1887 c. 174—46 V. c. 18—By-law—Repairs—Misapplication of funds — Negligence — Damages — Re-assessment—Inter-municipal works:

Township of Sombra v. *Township of Chatham*, 101; 28 S. C. R. 1.

16. Drainage—Damage by drain—Negligence in exercising statutory powers—Demurrer to statement of claim—Procedure —Action—Arbitration:

Foster v. *Municipality of Lansdowne*, 30; 12 Man. L. R. 42.

17. Drainage—Enlargement of drain—Work done beyond limits of initiating township—Error in mode of assessment—Assessment for future maintenance—Drainage Act, 1894, 57 V. c. 58, s. 75:

In re Township of Caradoc and Township of Ekfrid, In re Township of Metcalfe and Township of Ekfrid, 17 Occ. N. 398; 24 A. R. 576.

18. Drainage—Invalid by-law—Damages—Charging assessed area:

McCulloch v. *Township of Caledonia*, 398; 25 A. R. 417.

19. Drainage—Lands injuriously affected—Appeal to Court of Revision—Claim for damages—Sufficiency of notice—Filing notice—Arbitration—Statutes:

Thackeray v. *Township of Raleigh*, 236; 25 A. R. 226.

20. Drainage—Repairs to drain—"Person injuriously affected"—Mandamus—Drainage Act, 1894:

Stephens v. *Township of Moore*, 54; 25 A. R. 42.

21. Drainage by-laws—Registration—Effect of—Validity—R. S. O. c. 223, s. 396 (1):

Sutherland-Innes Co. v. *Township of Romney*, 342.

22. Expropriation of land—Claims for compensation—Limitation of time for enforcement of—Statutory amendment—Retroactivity:

In re Roden and City of Toronto, 54; 25 A. R. 12.

23. Fire brigade—Negligence—Damages:

Hesketh v. *City of Toronto*, 395; 25 A. R. 449.

MUNICIPAL CORPORATIONS—*Continued.*

24. Highway—Negligence—Encroachment—Nuisance — Obstruction of show-window—Municipal officers—Action for damages—Misfeasance during prior ownership—Nonfeasance—Statutable duty:

City of Montreal v. *Mulcair*, 28 S. C. R. 458.

25. Highway—Negligence—Excavation—Contractor or servant—Unsafe condition of highway—Nuisance—Injury to traveller—Liability of corporation—*Respondeat superior*—Misfeasance or non-feasance—Findings of jury:

Steves v. *District of South Vancouver*, 6 Brit. Col. L. R. 17.

26. Highway—Negligence—Ice on sidewalk—Reasonableness of obstruction or danger—Question of fact:

Taylor v. *City of Winnipeg*, 347.

27. Highway—Negligence—Liability—Misfeasance — Findings of jury—Proximate cause—Nonsuit:

Patterson v. *City of Victoria*, 5 Brit. Col. L. R. 628.

28. Highway—Negligence—Statutory duty or power—Misfeasance or nonfeasance—Findings of jury:

Gordon v. *City of Victoria*, 5 Brit. Col. L. R. 553.

29. Highway—Negligent construction of sidewalk—Misfeasance:

Smith v. *City of Vancouver*, 5 Brit. Col. L. R. 491.

30. Highway—Non-repair—Accident on boundary road—Notice of accident to both municipalities—Time—Joint action:

Leizert v. *Township of Matilda*, 6; 29 O. R. 98.

31. Highway—Obstruction—Notice—Liability—Relief over:

Rice v. *Town of Whitby*, 231; 25 A. R. 191.

32. Highway—Obstruction—Telephone pole—Non-repair — Runaway horses — Liability—Notice—Contributory negligence — Indemnity — Telephone company—Erection of poles—Sanction of corporation—Damages:

Atkinson v. *City of Chatham*, 310; 29 O. R. 518.

33. Highway—Old trails in Rupert's Land—Substituted roadway—Necessary way—R. S. C. c. 50, s. 108—Reservation in Crown grant—Dedication — User—Estoppel—Assessment—Evidence:

Heiminck v. *Town of Edmonton*, 336; 28 S. C. R. 501; *Brown* v. *Town of Edmonton*, 28 S. C. R. 510 n.

MUNICIPAL CORPORATIONS—*Continued.*

34. Highway—"Repair," meaning of—Accident—Runaway horses —Control:

Foley v. *Township of East Flamborough*, 60; 29 O. R. 139.

35. Highway—Non-repair—Hinge on trap-door on sidewalk—Accident—Negligence:

Ewing v. *City of Toronto*, 132; 29 O. R. 197.

36. Highway—Original road allowance between village and township—Joint liability to keep in repair—R. S. O. c. 223, s. 622:

Township of Stamford v. *Village of Niagara Falls*, 404.

37. Highway—Tiles placed on side of—Negligence—Evidence:

McDonald v. *Township of Yarmouth*, 136; 29 O. R. 259.

38. Injury to land by construction of public work—Agreement with land-owner — Construction of — Non-compliance with terms of—Liability of corporation for damages:

Chisholm v. *City of Halifax*, 29 N. S. Reps. 402.

39. License fee paid under illegal by-law—Action to recover back —Mistake in law—Voluntary payment—Duress—Payment *colore officii*:

Wheatley v. *City of Charlottetown*, 188.

40. Municipal building—Accident—Liability—Contractor —Relief over:

McCann v. *City of Toronto*, 19; 28 O. R. 650.

41. Public markets—Licensing traders and hucksters—Obstructing streets and sidewalks—Injury to adjacent private property—Loss of rents—Damages:

Davidson v. *City of Montreal*, 28 S. C. R. 421.

42. Servant of corporation—Carter employed to remove street sweepings—Relationship of master and servant—Liability of corporation for negligence of carter:

Saunders v. *City of Toronto*, 136; 29 O. R. 273.

43. Waterworks—R. S. O. c. 199—Award fixing amount to be paid for property—Passing of by-law to raise amount—Right of corporation to take possession—Time—Agent of corporation—Mortgagees—Parties:

Cornwall Waterworks Co. v. *Town of Cornwall*, 326; 29 O. R. 605.

MUNICIPAL CORPORATIONS—*Continued.*

44. Waterworks—Supply of water—Statutory obligation—Breach of contract:

Scottish Ontario and Manitoba Land Co. v. *City of Toronto, Defoe* v. *City of Toronto*, 263; 29 O. R. 459.

See Assessment and Taxes—Canada Temperance Act 3—Certiorari, 4—Company, 10—Constitutional Law, 5—Damages, 5—Ditches and Watercourses—Injunction, 1—Parties, 1—Prohibition, 3—Railways and Railway Companies, 5—Statutes, 3—Sunday—Way, 6.

MUNICIPAL ELECTIONS.

Quo warranto—Concurrent motions before Master in Chambers and County Court Judge—Proceedings by two relators—Duty of Judge as to second proceeding—Collusion—Jurisdiction—Waiver—Prohibition:

In re Regina ex rel. Hall v. *Gowanlock*, 184, 215; 29 O. R. 435.

MUINCIPAL TREASURER.

See Principal and Surety, 1.

MURDER.

See Criminal Law, 5, 7, 14, 15.

NAVIGATION.

See Maritime Law—Ship—Water and Watercourses, 2, 3.

NEGLECT TO SUPPORT WIFE.

See Criminal Law, 16, 17.

NEGLIGENCE.

1. Breach of duty—Injury occasioned—Master and servant—Common fault—Evidence—Inconsistent findings of jury—New trial—Misdirection—Pleading:

Cowans v. *Marshall*, 127; 28 S. C. R. 161.

2. Hire of chattels—Contract—Sub-contract—Defect — Damages—Liability of contractor to servant of sub-contractor:

tor:

Smith v. *Onderdonk*, 130; 25 A. R. 171.

3. Injury to carpenter at work on ship—Duty of owners of ship—Independent contractor—Proximate cause of injury—Questions for jury—Misdirection—Risks taken by plaintiff—New trial:

Williams v. *Bartling*, 30 N. S. Reps. 548.

NEGLIGENCE—*Continued.*

4. Injury to infant—Dangerous machine—Duty of owner of—Trespasser—Allurement:

Smith v. *Hayes*, 135; 29 O. R. 283.

See Appeal, 41—Contract, 8—Crown, 8, 10—Damages, 7—Discovery, 16—Fire—Jury, 1—Landlord and Tenant, 13—Maritime Law, 1—Master and Servant, 1, 2, 3, 8-12—Medical Practitioner, 2—Municipal Corporations, 15, 16, 23-32, 34-37, 40, 42—New Trial, 1—Parties, 8—Railways and Railway Companies, 1, 7, 11, 13—Solicitor, 8—Street Railways, 3, 4—Water and Watercourses, 1.

NEW TRIAL.

1. Action for negligence—Proof of facts not pleaded—Improper admission of evidence:

Zirkler v. *Robertson*, 30 N. S. Reps. 61.

2. Failure of defendant to appear at trial—Terms—Payment of costs:

Kirkpatrick v. *Mills*, 30 N. S. Reps. 426.

3. Misdirection—Malicious prosecution—Expression of opinion by trial Judge—Mistake in stating effect of evidence—Not grounds for setting aside verdict or for new trial:

Hawkins v. *Snow*, 29 N. S. Reps. 444.

4. Motion for—Action tried without jury—Finding of trial Judge—Disregard of, by Court—Burden of showing that finding wrong:

Boggs v. *Scott*, 34 N. B. Reps. 110.

5. Verdict against weight of evidence—Costs:

Maxwell v. *Malcolm*, 33 N. B. Reps. 595.

See Appeal, 44—Arrest, 15—Criminal Law, 6, 29, 32—Damages, 3, 5—Jury, 2—Libel, 1, 2, 4—Malicious Prosecution, 1—Master and Servant, 4—Medical Practitioner, 2—Negligence, 1, 3—Railways and Railway Companies, 11—Street Railways, 3—Trial.

NEWSPAPER.

See Costs, 28, 29—Libel, 4.

NEXT FRIEND.

See Costs, 27.

NONSUIT.

See Malicious Prosecution, 4—Municipal Corporations, 27.

NOT GUILTY BY STATUTE.

See Pleading, 19.

NOTICE.

See Chose in Action, 1—Crown Lands, 3—Executors and Administrators, 3—Fixtures, 3—Gift, 1—Insurance, 2, 9—Maritime Law, 1—Master and Servant, 5, 6—Municipal Corporations, 1, 10, 13, 19, 31, 32—Sale of Land, 3—Ship, 2—Solicitor, 5, 7, 12.

NOTICE OF ACCIDENT.

See Municipal Corporations, 30.

NOTICE OF ACTION.

See Pleading, 19.

NOTICE OF MOTION.

See Company, 16.

NOTICE OF TAXATION.

See Costs, 41.

NOTICE OF TRIAL.

1. Close of pleadings—Reopening—Order permitting third parties to defend:

Confederation Life Assn. v. *Labatt*, 383; 18 P. R. 238.

2. Irregularity—Close of pleadings—Service of papers—Waiver:

Hermann v. *Mandarin Gold Mining Co.*, 23; 18 P. R. 34.

NOTICE TO QUIT.

See Landlord and Tenant, 2.

NOVATION.

See Contract, 10, 11—Sale of Land, 4.

NUISANCE.

Church—Band of music on adjoining premises—Disturbance of public worship—Injunction:

Wardens of St. Margaret's Church, Toronto, v. *Stephens*, 132; 29 O. R. 185.

See Municipal Corporations, 24, 25.

NULLITY.

See Certiorari, 3—Deed, 1—Probate Courts, 1—Trial, 9.

OBSTRUCTING BAILIFF.

See Criminal Law, 18.

OFFICERS OF COMPANY.

See Discovery, 1-4, 12—Judgment Debtor.

OFFICIAL GUARDIAN.

See Devolution of Estates Act, 2.

ORDER OF COURT.

Rescission of—Accidental omission—Mislaid affidavit—Order 28, Rule 11:

Banque d'Hochelaga v. *Maritime Railway News Co.*, 89.

See Costs, 18—Judgment Debtor, 2—Receiver, 1, 3—Sale of Land, 5.

ORIGINATING NOTICE.

See Executors and Administrators, 1.

OVERHOLDING TENANT.

See Bankruptcy and Insolvency, 6—Landlord and Tenant, 14.

OYER AND TERMINER.

See Criminal Law, 11.

PACKING OF FROGS.

See Railways and Railway Companies, 10.

PARENT AND CHILD.

Agreement—Maintenance of parent—Consideration—Promise to bestow farm on child—Definite contract—Evidence—Change of intention—Improvements:

Smith v. *Smith*, 170; 29 O. R. 309.

See Gift, 2—Infant, 1-4.

PARLIAMENTARY ELECTIONS.

1. Petition—Application for leave to state a special case—R. S. B. C. c. 67, s. 1, s.-s. 8—Recount—Scope of special case insufficient to dispose of petition:

Esquimalt Election Case—Jardine v. *Bullen*, 6 Brit. Col. L. R. 220.

2. Petition—Motion to set aside service—Right of intervening electors to be heard upon—Carriage of proceedings—Rights of petitioner:

In re Annapolis Election—McLean v. *Mills*, 29 N. S. Reps. 452.

PARLIAMENTARY ELECTIONS—*Continued.*

3. Petition—Preliminary objections—Failure to file copy—Waiver—Amendment—Affidavit of petitioner—Reasons for belief—Petitioner guilty of corrupt practices—Petitioner not acquainted with contents of affidavit—False affidavit—Abuse of process of Court—Dismissal of petition:

   In re Restigouche Dominion Election—Alexander v. *McAllister*, 34 N B Reps. 163.

4. Petition—Status of petitioner—Alien—Voting without right—Affidavit verifying petition—False affidavit—Taking petition off files—Substituting petitioner—Terms:

   In re South Ontario Provincial Election—Pilkey v. *Calder*, 321.

5. Recount of ballots—Ballots marked in wrong division of paper—Mutilation of ballot—Presumption—Ballots marked for both candidates—Ballots with additional marks—Words written on ballots—Presumption—Imperfect crosses—Spoiled bollot:

   In re West Elgin Provincial Election, 249.

6. Recount of ballots—Ballots numbered on back by deputy returning officer—Ballots marked in wrong division of paper—Fault in printing of paper—Name of candidate above line—Ambiguity of mark:

   In re South Perth Provincial Election, 255.

7. Recount of ballots—Initials of poll-clerk, instead of deputy returning officer—Mutilation of ballot—Material part missing—Presumption—Words written on ballot—Presumption:

   In re West Huron Provincial Election, 247.

See Attachment of Debts, 1—Libel and Slander.

PARTICULARS.

1. Application for—Close of pleadings—Affidavit—Necessity—Trial:

   Bank of Toronto v. *Ins. Co. of North America*, 69; 18 P. R. 27.

2. Replevin—Deed of assignment—Plea of fraudulent purpose and intent—Statute of Elizabeth—Particulars of fraud:

   Pitfield v. *Guest*, 144.

See Pleading, 2, 10, 14.

PARTIES.

1. Action brought against municipal corporation to recover amount paid under pressure for water—Amount actually paid by purchaser—Reimbursement of purchaser by vendor—Action by vendor—Principal and agent—Leave to add purchaser—Terms—Costs:

Lindberg v. *City of Halifax*, 31 N. S. Reps. 154.

2. Action by devisees—Executor not a party:

Graham v. *British Canadian L. & I. Co.*, 34, 315; 12 Man. L. R. 244.

3. Action by simple contract creditor to set aside fraudulent conveyance—Decease of debtor—No representation of estate—Debt barred by Statute of Limitations—Frame of action:

Malone v. *Mundy*, 10.

4. Action for tort—Two defendants—Separate acts alleged against each—Pleading—Joint tort-feasors—Uncertainty as to responsibility—Motion to strike out:

Bowness v. *City of Victoria*, *Gordon* v. *City of Victoria*, 5 Brit. Col. L. R. 503.

5. Addition of—Rule 206 (2)—Amendment—Alternative claim—Rule 192—Company—President—Contract:

Tate v. *Natural Gas and Oil Co. of Ontario*, 115, 167; 18 P. R. 82.

6. Assignment of debt sued on—Reassignment—Assignment by way of security only—Amendment—Adding assignee as a party:

Walls v. *Sault Ste. Marie Paper and Pulp Co.*, 117.

7. Claim against partnership—Action against surviving partner and administratrix of deceased partner—Concurrent administration proceedings—Third party notice—Indemnity or relief over—Claim upon collateral security:

Campbell v. *Farley*, 141, 170; 18 P. R. 97.

8. Indemnity—Relief over—Third parties—Identity of claims—Negligence—Breach of contract:

Wilson v. *Boulter*, 182; 18 P. R. 107.

9. Joinder of defendants—Claimants to same mining ground:

Dunlop v. *Haney*, 6 Brit. Col. L. R. 169.

10. Mortgage—Declaration that property free from—Banks and banking—Assignor of mortgage a necessary party, where liable on collateral security to assignee:

Conn v. *Smith* 17 Occ. N. 422; 28 O. R. 629.

PARTIES—*Continued.*

11. Substitution of plaintiff—Class suit—Dismissal of action—Appeal to Court of Appeal—Security for costs—Time—Extension:
Macdonald v. *City of Toronto*, 3; 18 P. R. 17.

See Amendment, 5—Bankruptcy and Insolvency, 1, 22—Company, 2—Executors and Administrators, 3—Landlord and Tenant, 1—Master and Servant, 1—Mortgage, 7—Municipal Corporations, 3, 43—Receiver, 1—Trusts and Trustees, 3.

PARTNERSHIP.

1. Agreement—Construction—Whether persons partners *inter se*:
Martin v. *Martin*, 242; 1 N. B. Eq. Reps. 515.

2. Costs of action against firm—Liability for, of partner not served and without knowledge of the action—Costs of appeal by co-partners—Remedy over against co-partners:
Banque d' Hochelaga v. *Maritime Railway News Co.*, 31 N. S. Reps. 9.

3. Foreign partnership—Right to sue in firm name:
Knauth Nachod v. *Stern*, 30 N. S. Reps. 251.

4. Purchase of land for use of—Parol agreement—Action to declare trust—Statute of Frauds:
Brown v. *Grady*, 6 Brit. Col. L. R. 190.

See Advocate, 1—Amendment, 5—Bankruptcy and Insolvency, 4, 5—Contract, 3, 11, 12, 18—Judgment, 9—Mines and Minerals, 8—Parties, 7—Receiver, 5.

PASSENGER.

See Railways and Railway Companies, 12, 13—Street Railways, 2, 3.

PATENT OF INVENTION.

Canadian patent—Foreign patent—Expiration of—Effect of—Construction of Patent Act:
Auer Incandescent Light Mfg. Co. v. *Dreschel*, 166; 6 Ex. C. R. 55; 28 S. C. R. 608.

See Contract, 7—Discovery, 8.

PAYMENT.

Identity of payee—Payment to garnishing creditors of another person of same name—Division Court—Order of—Protection to garnishees—Interest on moneys recovered:
Andrew v. *Canadian Mutual L. & I. Co.*, 138; 29 O. R. 365.

See Bankruptcy and Insolvency, 15, 19—Benefit Societies—Crown, 3, 6—Division Courts, 3—Prohibition, 13.

PAYMENT INTO AND OUT OF COURT.

See Company, 15—Infant, 6—Money in Court—Receiver, 3.

PENALTY.

See Bond—Canada Temperance Act, 2—Criminal Law, 34—Judgment, 1—Statutes, 1—Summary Conviction, 5, 10.

PENSION.

See Equitable Execution, 2.

PERJURY.

See Criminal Law, 20, 21.

PETITION.

See Company, 17-19—Judgment, 10—Parliamentary Elections, 1, 4—Real Property Act—Supreme Court of Canada, 2.

PHYSICIAN.

See Medical Practitioner, 1.

PLEADING.

1. Action for damages for false representations—Necessary averments:

   Arthur v. *Runians*, 357; 18 P. R. 205.

2. Action for possession of land—Particulars of title—Necessity for giving:

   Esquimalt and Nanaimo R. W. Co. v. *New Vancouver Coal Co.*, 6 Brit. Col. L. R. 188.

3. Action on contract—Defence of Statute of Frauds—Evidence of substituted contract given at trial—Refusal of amendment:

   Strong v. *Bent*, 31 N. S. Reps. 1.

4. Bill of complaint—Time—Leave to file—Terms—53 V. c. 4, s. 22 (N.B.):

   Fleming v. *Harding*, 1 N. B. Eq. Reps. 515.

5. Declaration—Action against surety on administration bond—Breach—Non-payment of plaintiff's debt—Duplicity:

   Smith v. *Smith*, 423.

6. Defence of set-off—No offer to set off—Demurrer:

   Fillmore v. *Cartwright*, 33 N. B. Reps. 621.

7. Foreclosure—Joinder of causes of action—Claim to set aside tax deed—Multifariousness:

   Day v. *Rutledge*, 150, 315; 12 Man. L. R. 290.

PLEADING—*Continued.*

8. Reading paragraphs together—Uncertainty:

Zirkler v. *Robertson*, 30 N. S. Reps. 61.

9. Signing plea — Attorney — Counsel — Irregularity — Leave to amend—Interlocutory judgment—Setting aside:

Frigean v. *Collet*, 366.

10. Slander—Particulars—Names of persons—Times and places—Striking out—Amendment:

Townsend v. *O'Keefe*, 241; 18 P. R. 147.

11. Statement of claim—Extension of claim made in writ of summons—Rule 244:

Smythe v. *Martin*, 359; 18 P. R. 227.

12. Statement of claim—Late delivery—Irregularity—Motion:

McIsaac v. *Broad Cove Coal Co. and Hussey*, 266.

13. Statement of defence—Delivery of—Time—Leave to defend upon dismissal of motion for summary judgment:

Pounder v. *Corner*, 6 Brit. Col. L. R. 177.

14. Statement of defence—Striking out—Omission to give particulars of agreement relied on—Amendment—Appeal—Costs:

Power v. *Pringle*, 31 N. S. Reps. 78.

15. Striking out—Action on promissory notes—Defence that collateral security given and accepted—No allegation that further time given:

Arthur v. *Yeadon*, 29 N. S. Reps. 379.

16. Striking out—Disclosing no reasonable answer—Rule 261—Defence originally good—Amendment of statement of claim—Duty of defendant to amend also:

Christy v. *Ion Specialty Co.*, 85.

17. Striking out—Embarrassment—Prolixity—Failure to tender an issue:

Brock v. *Tew*, 8; 18 P. R. 30.

18. Striking out—Falsity—Conflict of testimony—Presumption in favour of pleading:

Banks v. *Batton*, 30 N. S. Reps. 386.

19. Trespass—Constable—"Not guilty by statute"—Want of notice of action—Amendment:

Alderich v. *Humphrey*, 172; 29 O. R. 427.

PLEADING—*Continued.*

See Action, 2—Amendment, 3, 4, 5—Bills of Exchange and Promissory Notes,1—Bills of Sale and Chattel Mortgages, 6—Company, 2—Contract, 3—Demurrer—Insurance, 21—Master and Servant, 1, 4—Medical Practitioner, 2—Mortgage, 11—Municipal Corporations, 16—Negligence, 1—Notice of Trial—Particulars—Parties, 4—Settlement of Action—Solicitor, 1—Trespass to Land, 1—Trial, 5—Water and Watercourses, 8—Way, 4.

PLEDGE.

See Bankruptcy and Insolvency, 1.

POLICE MAGISTRATE.

1. Summary conviction—Canada Temperance Act—Disqualification—Interest in fines—Bias—Evidence as to offence—Finding of magistrate—Review by Court:

Ex p. McCoy, 33 N. B. Reps. 605.

2. Summary trial—"Court of Record"—R. S. O. c. 83—*Habeas corpus*:

Reg. v. *Gibson*, 345; 29 O. R. 660.

See Company, 10—Criminal Law, 12—Prohibition, 14, 15—Summary Conviction.

POLICY.

See Insurance.

POST OFFICE ACT.

See Bankruptcy and Insolvency, 19.

POWER OF APPOINTMENT.

See Revenue, 3.

POWER OF SALE.

See Executors and Administrators, 3—Mortgage, 9, 10—Ship, 1—Trusts and Trustees, 7.

PRACTICE.

See Absconding Debtor—Account—Action, 2, 3—Administration—Advocate — Affidavit — Alimony, 1—Amendment—Appeal—Arbitration and Award, 1—Arrest—Attachment of Debts—Bankruptcy and Insolvency, 5, 7—Bastard—Bills of Sale and Chattel Mortgages, 6—Certiorari—Company, 2, 8, 9, 13, 19—Contempt of Court—Contract, 1, 3—Costs—County Courts — Courts — Deed, 6—Demurrer—Devolution of Estates Act, 2—Discovery—Division Courts

PRACTICE—*Continued.*

—Equitable Execution — Evidence, 4, 8, 10, 12—Exchequer Court of Canada, 1—Execution, 2, 3, 4, 5—Executors and Administrators, 1—Fraudulent Conveyance, 2—Indian—Infant, 6—Injunction, 2, 3, 4—Insurance, 18, 21—Judgment — Judgment Debtor — Jury Notice—Law Stamps—Lis Pendens — Mechanics' Liens — Mines and Minerals, 1, 4, 5, 9—Money in Court—Mortgage, 10, 11—Municipal Corporations, 1, 3, 9, 16, 19—Municipal Elections—New Trial, 2, 5—Notice of Trial—Order of Court—Parliamentary Elections, 1-4—Particulars—Parties—Partnership, 2—Payment—Pleading—Probate Courts—Prohibition—Railways and Railway Companies, 14—Real Property Act—Receiver—Referee in Chambers—Reference—Replevin—Sale of Land, 5—Service of Papers—Settled Estates Act——Settlement of Action—Sheriff—Solicitor—Stay of Proceedings—Summary Conviction — Supreme Court of Canada—Surrogate Courts—Tender—Time—Trial—Trusts and Trustees, 1, 3, 4—Vacation—Venue—Way, 6—Writ of Summons.

PREFERENCES.

See Bankruptcy and Insolvency.

PRELIMINARY OBJECTIONS.

See Parliamentary Elections, 3.

PRESCRIPTION.

See Easement, 2—Limitation of Actions—Way, 2, 5.

PRESSURE.

See Bankruptcy and Insolvency, 16, 17, 18, 21.

PRESUMPTION.

See Arrest, 3—Bankruptcy and Insolvency, 16—Bills of Exchange and Promissory Notes, 5—Criminal Law, 17—Landlord and Tenant, 13—Parliamentary Elections, 5, 7—Pleading, 18—Seduction—Way, 2.

PRIMOGENITURE.

See Will, 3.

PRINCIPAL AND AGENT.

1. Authority of manager to bind mining company—Apparent scope of authority—Material for erection of boarding-house—Necessity for efficient operation of mine:

Miller v. *Cochran Hill Gold Mining Co.*, 29 N. S. Reps. 304.

PRINCIPAL AND AGENT—*Continued.*

2. Broker—Stock exchange custom—Sale of shares — Marginal transfer—Undisclosed principal — Acceptance—"Settlement"—Obligations of purchaser—Construction of contract—The Bank Act, R. S. C. c. 120, ss. 70-77—Liability of shareholders—"Stock jobbing:"

Boultbee v. *Gzowski*, 385.

3. Goods intrusted to agent for sale—Proceeds applied in payment of agent's own debt—Action by principal to recover money from agent's creditor—Absence of authority from principal—No change in creditor's position:

Hickman v. *Baker*, 31 N. S. Reps. 208.

4. Transfer of property by agent in excess of authority—Right of principal to recover from transferee—Damages for detention—Not necessary to allege special damage—Costs:

Garden v. *Neily*, 31 N. S. Reps. 89.

5. Undisclosed principal — Liability of, for goods supplied to agent—Debtor acting as agent for his assignee for benefit of creditors:

Hutching v. *Adams*, 146; 12 Man. L. R. 118.

See Distress—Duress, 1—Executors and Administrators, 3—Insurance, 1—Municipal Corporations, 43—Parties, 1—Sale of Land, 1—Vendor and Purchaser, 1.

PRINCIPAL AND SURETY.

1. Bond—Municipal treasurer—Audit—Representation as to correctness of accounts:

County of Simcoe v. *Burton*, 392.

2. Counter-security—Right to enforce—Depreciation—Failure to realize—Contribution between co-sureties:

Moorhouse v. *Kidd*, 235; 25 A. R. 221.

3. Discharge of debtor by creditor — Reservation of remedies against surety—Operation of—Covenant not to sue—Release of surety:

Donaldson v. *Wherry*, 306; 29 O. R. 552.

4. Recovery of judgment by creditor against surety—Subsequent payment of dividend from principal's estate—Indemnity—Apportionment:

Hood v. *Coleman Planing Mill and Lumber Co. of Burlington*, 409.

See Contract, 3, 19—Trusts and Trustees, 3.

PRIVILEGE.

See Contempt of Court—Criminal Law, 5—Libel, 3, 5—Libel and Slander.

PRIVY COUNCIL.

See Appeal, 33.

PROBATE COURTS.

1. Absence of Judge—Appointment of deputy—Jurisdiction of deputy to deliver judgment after return of regular Judge —Judgment—Nullity—Removal by *certiorari*—Appeal:

   Reg. v. *Foster—In re Esson Estate*, 30 N. S. Reps. 1.

2. Territorial jurisdiction—R. S. N. S., 5th series, c. 100, s. 2—Place where deceased "last dwelt"—Revocation of letters probate—Costs—Executor:

   In re Fraser Estate, 30 N. S. Reps. 272.

See Surrogate Courts.

PROCURESS.

See Criminal Law, 25.

PRODUCTION OF DOCUMENTS.

See Discovery, 3, 8, 12-16.

PROFITS.

See Limitation of Actions, 3.

PROHIBITION.

1. County Court — Amount in controversy—Settled account—Jurisdiction dependent on contested facts:

   Loppky v. *Hofley*, 369.

2. County Court—Trial of issue of bastardy—Time for trial—C. S. N. B. c. 103, s. 7:

   Ex p. Reid, 34 N. B. Reps. 133.

3. County Court Judge—Assessment and taxes—Court of Revision —Appeal from—Assessor—Right to appeal — Municipal corporation:

   In re British Mortgage Loan Co., 338; 29 O. R. 641.

4. County Court Judge—Municipal election inquiry—Municipal Act, s. 220, s.-s. 4; s. 227—Proceedings by two relators—Duty of Judge as to second proceeding—Collusion—Jurisdiction—Waiver:

   In re Reg. ex rel. Hall v. *Gowanlock*, 184, 215; 29 O. R. 435.

PROHIBITION—*Continued.*

5. County Court Judge—Order for costs—Appeal to Sessions—Summary conviction under Dominion Act against frauds in supplying milk, etc.—Criminal Code, ss. 879, 880:

In re Reg. v. *McIntosh*, 17 Occ. N. 407; 28 O. R. 603.

6. Division Court—Amount in dispute—Unsettled account—Apparent want of jurisdiction—Interest—Part prohibition:

In re Lott v. *Cameron*, 20, 59; 29 O. R. 70.

7. Division Court—Application for—Forum—Chambers:

Johnston v. *Galbraith*, 58.

8. Division Court—Assignments and preferences—Action by assignee for creditors to recover money paid to a creditor—R. S. O. 1897 c. 141, s. 10—Jurisdiction of Division Court—Satisfaction of judgment—Motion for prohibition:

In re Beattie v. *Holmes*, 68, 84; 29 O. R. 264.

9. Division Court—Assignment of annuity—Condition of will—Action against executor — Equitable claim — Account—Jurisdiction:

In re McGibbon v. *Eager*, 311.

10. Division Court—Garnishee—Judgment summons—Committal—Examination—Affidavit—R. S. O. 1887 c. 51, s. 235—57 V. c. 23, s. 18:

In re Doucler v. *Duffy*, 70; 29 O. R. 40.

11. Division Court—Jurisdiction—Cause of action—Principal and interest due on mortgage—Splitting demand—Assignee of covenant—R. S. O. c. 60, s. 79—Indemnity:

In re Real Estate Loan Co. of Canada v. *Gardhouse*, 340; 29 O. R. 602.

12. Division Court—Jurisdiction—Trial by jury—Questions submitted—Verdict entered thereon by Judge—Acquiescence:

In re Jones v. *Julian*, 17 Occ. N. 360, 368; 28 O. R. 601.

13. Division Court—Tort—Payment of money into Court in satisfaction—Continuance of action—Right to take money out—Jurisdiction:

In re O'Neil v. *Hobbs*, 328; 29 O. R. 487.

14. Police magistrate—Charge against an incorporated company—"Indictable offence"—Criminal Code, s. 448—Jurisdiction to hold preliminary inquiry:

In re Reg. v. *T. Eaton Co. (Ltd.)*, 345; 29 O. R. 591.

PROHIBITION—*Continued.*

15. Police magistrate—Jurisdiction over incorporated company—Service of summons—Offence against municipal by-law—Municipal Act, s. 705—Criminal Code, ss. 562, 853, 858:

In re Reg. v. *Toronto R. W. Co.*, 412.

16. Small Debts Court, B. C.—Jurisdiction—Claim of exemption—Homestead Act—Goods seized under execution from Small Debts Court:

Augberg v. *Anderson*, *Stewart* v. *Anderson*, 5 Brit. Col. L. R. 622.

See Appeal, 26, 50—Assessment and Taxes, 1—Company, 10—Division Courts, 2—Municipal Elections.

PROMISSORY NOTES.

See Bills of Exchange and Promissory Notes, 2-6—Costs, 22—Evidence, 9.

PROSTITUTION.

See Criminal Law, 25.

PROTHONOTARY.

See Amendment, 1.

PROXIMATE CAUSE.

See Municipal Corporations, 27—Negligence, 3.

PUBLIC POLICY.

See Contract, 12—Crown Lands, 3.

PUBLIC SCHOOLS.

See Schools.

PUBLIC WORKS.

See Crown, 4, 5, 8, 9, 10—Municipal Corporations, 33.

PUBLIC WORSHIP.

See Nuisance.

PUBLICATION.

See Arbitration and Award, 1—Letters—Libel, 6.

QUO WARRANTO.

See Municipal Elections.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See Constitutional Law, 5, 6—Railways and Railway Companies, 5, 10, 15.

RAILWAYS AND RAILWAY COMPANIES.

1. Construction of railway—Damages caused by—Negligence—Action for, against sub-contractor—Limitation of actions—Provisions of Dominion and Ontario Railway Acts—Defence of sub-contractor:

Hendrie v. *Onderdonk*, 258.

2. Expropriation of land—Arbitration — Evidence—Findings of fact—Duty of appellate Court:

Grand Trunk R. W. Co. v. *Coupal*, 334; 28 S. C. R. 531.

3. Expropriation of land—Arbitration and award—Death of arbitractor before award—Time—Continuation of arbitration—Appointment of new arbitrator—Railway Act of Canada, 51 V. c. 29, ss. 156, 157:

Shannon v. *Montreal Park and Island R. W. Co.*, 28 S. C. R. 374.

4. Expropriation of land— Award—Appeal—Forum:

In re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 128; 25 A. R. 88.

5. Highways—Crossings—Maintenance of gates—Municipal corporations—Apportionment of cost—Railway Committee—Constitutional law—Railway Act, 1888:

In re Canadian Pacific R. W. Co. and County and Township of York, 48; 25 A. R. 65.

6. Lands injuriously affected—Operation of the railway—Personal inconvenience—Dominion Railway Act, 51 V. c. 29:

Powell v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 234; 25 A. R. 209.

7. Negligence—Collision—Injury to person carried free—Contract as to connecting line—Exoneration:

Bicknell v. *Grand Trunk R. W. Co.*, 342.

8. Negligence—Fire caused by sparks from engine—Circumstantial evidence—Cutting down weeds:

Rainville v. *Grand Trunk R. W. Co.*, 17 Occ. N. 379; 18 Occ. N. 231; 28 O. R. 625; 25 A. R. 242.

9. Negligence—Highway crossing—Statutory warning—Damages—Mental shock:

Henderson v. *Canada Atlantic R. W. Co.*, 397; 25 A. R. 437.

10. Negligence—Packing of railway frogs—Railway Committee of Privy Council—Statutes—Construction of—51 V. c. 29, s. 262, s.-ss. 3, 4 (D.):

Washington v. *Grand Trunk R. W. Co.*, 125; 28 S. C. R. 184.

RAILWAYS AND RAILWAY COMPANIES—*Continued.*

11. Negligence—Statutory duty—Omission of—Dominion Railway Act, 51 V. c. 29, s. 289—Constitutional law—Workmen's Compensation Act — Executors and administrators — Damages—Reduction—New trial:

Curran v. *Grand Trunk R. W. Co.*, 396; 25 A. R. 407.

12. Passenger—Contract to carry—Continuous journey—Break in railway—Omnibus transfer—Demand of fare—Refusal to carry—Damages—Costs:

Clarry v. *Grand Trunk R. W. Co.*, 13; 29 O. R. 18.

13. Passenger—Trespass—Invitation — Negligence—Station—Evidence:

Anderson v. *Grand Trunk R. W. Co.*, 17 Occ. N. 392; 18 Occ. N. 299; 24 A. R. 672; 28 S. C. R. 541.

14. Receiver—Trustees—Application for leave to bring actions against company—Receiver not in possession of railway—Practice—*Ex parte* motion:

Allan v. *Manitoba and North-Western R. W. Co.*, 148; 12 Man. L. R. 57.

15. Restrictions under Dominion charter against crossing at grade—Constitutional law—*Intra vires*—Dominion Railway Act, 1888, ss. 21, 306, 307—Jurisdiction of Railway Committee:

Grand Trunk R. W. Co. v. *Hamilton Radial Electric R. W. Co.*, 17 Occ. N. 220; 29 O. R. 143.

See Appeal, 3, 4—Constitutional Law, 2, 5, 6—Crown, 5—Damages, 7, 8—Jurisdiction—Water and Watercourses, 1.

RAPE.

See Criminal Law, 26, 27.

RATIFICATION.

See Company, 1—Contract, 3—Crown, 6, 7.

REAL PROPERTY ACT.

Compliance with requirements of Act—Sufficiency of description of property and of interest claimed by petitioner—Address of caveator—Admission of further evidence on appeal—Conditions imposed:

Adams v. *Hockin*, 32; 12 Man. L. R. 11.

REASONABLE AND PROBABLE CAUSE.

See Malicious Prosecution.

RECEIPT.

See Crown, 3.

RECEIVER.

1. Equitable execution—Administrator *ad litem—Ex parte* order—Subsequent issue of letters of administration—Motion to set aside order—" Parties "—Rule 538—Administration—Advertisement for creditors:

McLean v. *Allen*, 411.

2. Equitable execution—Interest as mortgagee of land—Effect on, of recorded judgment—Sale of interest under ordinary execution:

Nova Scotia Mining Co. v. *Greener*, 31 N. S. Reps. 189.

3. Money in hands of—Payment into Court—Default—Attachment—Order for—Motion to rescind—Delay—Irregularities—Specific order for payment—Punishment—R. S. O. 1887 c. 67, ss. 6, 11—Understanding between receiver and solicitor—Claim of receiver upon moneys in his hands:

Fawkes v. *Griffin*, 51; 18 P. R. 48.

4. Order for—Court or Chambers:

Wakefield v. *Turner*, 6 Brit. Col. L. R. 216.

5. Partnership, property—Application by judgment creditor for charge on funds in hands of receiver—Charge to be subject to order of Court—Preservation of rights of other creditors:

O'Brien v. *Christie*, 30 N. S. Reps. 145.

See Absconding Debtor—Appeal, 6—Arrest, 13—Equitable Execution, 2 — Railways and Railway Companies, 14—Will, 15.

RECEIVER-GENERAL.

See Company, 15.

REDEMPTION.

See Company, 5—Mortgage, 4.

RECEIVING STOLEN GOODS.

See Criminal Law, 28.

RECOUNT OF BALLOTS.

See Parliamentary Elections, 1, 5-7.

REFEREE IN CHAMBERS.

Jurisdiction—Queen's Bench Act, 1895—Rules, 26, 61, 804—Order for sale of land :

Watson v. *Dandy*, 154; 12 Man. L. R. 175.

REFERENCE.

Place of—Administration:

In re Armstrong—Armstrong v. *Armstrong*, 80; 18 P. R. 55.

See Administration, 2—Amendment, 2 — Costs, 2—Sale of Land, 6.

REFORMATION OF CONTRACT.

See Contract, 4—Crown, 3.

REFORMATION OF DEED.

See Deed, 6, 7, 8.

REGISTRY LAWS.

1. Mortgage—Unregistered agreement for—Declaration of charge —Registered judgment—Priorities:

Case v. *Bartlett*, 153, 293; 12 Man. L. R. 280.

2. Priorities—Action of creditors having registered judgments—Attack on prior registered deed—Title not in grantor by reason of unregistered deed—*Bona fides*—Good consideration:

Bauld v. *Ross*, 31 N. S. Reps. 33.

3. Priorities—Mortgage for balance of purchase money—Estoppel:

McMillan v. *Munro*, 233; 25 A. R. 288.

See Bond—Crown Lands, 3—Deed, 1—Dower, 1—Evidence, 4 —Execution, 1—Lis Pendens—Mortgage, 1, 7—Municipal Corporations, 10, 21—Real Property Act.

RELEASE.

See Contract, 16—Landlord and Tenant, 4—Principal and Surety, 3.

REMUNERATION.

See Trusts and Trustees, 4, 5.

RENT.

See Landlord and Tenant, 1, 3, 6-9, 12.

RENUNCIATION.

See Husband and Wife, 5.

REPEAL.

See Canada Temperance Act, 6.

REPLEVIN.

Affidavit of plaintiff—Sworn before *ante litem* solicitor of plaintiff —Bond—Requirements as to sureties—Ship, whether repleviable :

Dunsmuir v. *Klondike and Columbian Gold Fields, Ltd.*, 6 Brit. Col. L. R. 200.

See Particulars, 2—Sheriff, 1, 2.

REPLY.

See Trial, 12 .

REPUGNANCY.

See Landlord and Tenant, 11.

RES JUDICATA.

Judgment on case stated by magistrate—Subsequent motion to quash magistrate's conviction:

Reg. v. *Monaghan*, 45.

See Appeal, 11—Boundaries—Indian—Mortgage, 7.

RESCISSION OF ORDER.

See Costs, 18—Judgment Debtor, 2—Order of Court—Receiver, 1, 3—Sale of Land, 5.

RESERVATION.

See Easement, 3.

RESOLUTION.

See Certiorari, 4—Municipal Corporations, 14.

RESTITUTION.

See Execution, 5.

RESTRAINT OF TRADE.

See Contract, 13—Covenant.

RETAINER.

See Solicitor, 1, 3, 10, 11.

RETURNING OFFICER.

See Attachment of Debts, 1.

REVENUE.

1. Succession duty—Liability of estate for—Property in another Province—Testator domiciled in another Province—Surrogate Courts—Jurisdiction:

In re Renfrew Estate, 194, 324; 29 O. R. 565.

REVENUE—*Continued.*

2. Succession duty—Life insurance moneys payable without the Province—Beneficiary domiciled within the Province:
Re Templeton, 6 Brit. Col. L. R. 180.

3. Succession duty—Nova Scotia Succession Duty Act, 1895—Application of, where testator died before Act passed—Power of appointment exercised after passing of Act:
Attorney-General v. *Parker*, 31 N. S. Reps. 202.

REVERSION.

See Mortgage, 8.

REVOCATION.

See Probate Courts, 2.

RIGHT OF WAY.

See Way.

RIPARIAN RIGHTS.

See Water and Watercourses, 4, 5, 6.

RIVER.

See Water and Watercourses.

ROAD.

See Way.

RULE NISI.

See Certiorari, 5—Summary Conviction, 7.

SALE.

See Canada Temperance Act, 7—Contract, 7, 15—Covenant.

SALE OF GOODS.

1. Conditional sale—Bill of exchange for price—Lien clause—Property not to pass—Recovery of judgment in action on bill—Election to treat contract as completed:
Purtle v. *Heney*, 33 N. B. Reps. 607.

2. Conditional sale or lease—Bills of Sale Act—Application of—Provision that hirer to receive another article of equal value:
Guest v. *Diack*, 29 N. S. Reps. 504.

3. Executory contract—Possession—Non-payment of price—Loss of goods—Liability:
Hesselbacher v. *Ballantyne*, 49; 25 A. R. 36.

4. Lien note signed after sale and delivery—Trespass—Justification:
Gallant v. *Mellett*, 199.

SALE OF GOODS—*Continued.*

5. Purchase after inspection—Defect in quality—*Caveat emptor*:
Creighton v. *Pacific Coast Lumber Co.*, 425.

6. Sale of oats by sample—Evidence—Admissibility—Certificate of inspection:
Quintal v. *Chalmers*, 316; 12 Man. L. R. 231.

7. Second-hand machine—Construction of agreement—Condition precedent:
Abell v. *Craig*, 296.

8. Storage of wheat in elevator—Bailment or sale—Statute of Frauds:
Lawlor v. *Nicol*, 318; 12 Man. L. R. 224.

See Bailment—Contract, 1, 5, 14—Crown, 6—Execution, 5—Principal and Agent, 3.

SALE OF JUDGMENT.

See Solicitor, 4, 5.

SALE OF LAND.

1. Contract—Breach—Action for damages—Vendor responsible for mistake of agent—Principal and agent:
Jenkins v. *Murray*, 31 N. S. Reps. 172.

2. Contract—Payment of purchase money by instalments—Possession taken by purchaser—Covenant to pay taxes—Liability of purchaser—Demand—Necessity for—Time at which municipal taxes due:
Borrowman v. *Fader*, 31 N. S. Reps. 20.

3. Contract—Payments by purchaser on account—Judgment recovered by vendor for balance—Right to terminate contract, notwithstanding—Forfeiture of payments made—Time made essence of contract by notice:
Gibbons v. *Cozens*, 179; 29 O. R. 356.

4. Contract under seal—Purchaser taking possession—Action of trespass by person claiming under vendor—Agreement by purchaser to relinquish rights—Action for damages—Estoppel—New contract in substitution for one under seal—Right of purchaser to recover damages for loss of bargain—Expenses incurred:
Wentzel v. *Ross*, 30 N. S. Reps. 136.

5. Judicial sale—Order of Court—Conditional purchase—Order for payment of purchase money—*Ex parte* order—Motion to rescind—Issue of execution—Effect of taking possession—Waiver:
Currie v. *Rapid City Farmers' Elevator Co.*, 73; 12 Man. L. R. 105.

SALE OF LAND—*Continued.*

6. Vendee taking possession—Neglect to pay purchase money and refusal to surrender possession — Action of ejectment—Objection to plaintiff's title—Whether open to defendant—Estoppel—Notice of tenancy—Extent and terms of tenancy—Mesne profits—Reference—Power of trial Judge:

Hesslein v. *Wallace*, 29 N. S. Reps. 424.

See Evidence, 4—Execution, 1—Fraudulent Conveyance, 2—Insurance, 5—Referee in Chambers—Vendor and Purchaser.

SALVAGE.

See Maritime Law, 3.

SAMPLE.

See Sale of Goods, 6.

SAVINGS BANK.

See Gift, 1.

SCALE OF COSTS.

See Costs, 19-25.

SCHOOLS.

1. Public schools—Alteration of boundaries of school sections—Division of section—Appeal to county council—Arbitration and award—*Ultra vires*—Change in law—54 V. c. 85, s. 82—Construction of :

In re School Section 16, Township of Hamilton, 175; 29 O. R. 390.

2. Public schools—Board of trustees—Dismissal of teacher—Notice of—Corporate act—C. S. N. B. c. 65:

Robertson v. *Trustees of School District No. 2, Parish of Durham*, 34 N. B. Reps. 103.

3. Public schools—Dissolution of union school section—Power of arbitrators—59 V. c. 70, ss. 43, 44:

In re McGillivray and Chesterville Public School Board, 118; 29 O. R. 321.

See Arrest, 15—Assessment and Taxes, 2—Constitutional Law, 1—Municipal Corporations, 11.

SCIRE FACIAS.

See Company, 8.

SCRUTINY.

See Canada Temperance Act, 6.

SEAL.

See Arrest, 1—Company, 4, 7—Contract, 16—Landlord and Tenant, 10—Sale of Land, 4.

SEARCH WARRANT.

See Canada Temperance Act, 5—Discovery, 10.

SECURITY FOR COSTS.

See Administration, 2—Appeal, 21, 30—Costs, 26-34—Executors and Administrators, 1—Parties, 11.

SEDUCTION.

Evidence—Presumption of service—Loss of service—Action—R. S. O. c. 58:

Harrison v. *Prentice*, 17 Occ. N. 396; 24 A. R. 677.

SENTENCE.

See Criminal Law, 12.

SEPARATE ESTATE.

See Husband and Wife—Mortgage, 12.

SERVICE OF PAPERS.

1. Motion to commit—Copies of affidavits:

Hannum v. *McRae*, 354; 18 P. R. 185.

2. Motion to take bill pro confesso—Necessity for service of clerk's certificate:

Goddfroi v. *Paulin*, 422.

3. Summons—Solicitor—General agent:

Barnes v. *Gray*, 6 Brit. Col. L. R. 219.

See Appeal, 32—Company, 10—Contempt of Court—Ditches and Watercourses—Judgment, 7, 12, 18—Judgment Debtor, 2—Jurisdiction—Notice of Trial, 2—Parliamentary Elections, 2—Solicitor, 3—Writ of Summons, 1, 2.

SERVITUDE.

See Deed, 4.

SESSIONS.

See Costs, 18—Prohibition, 5.

SET-OFF.

See Contract, 11—Costs, 35, 36—Pleading, 6.

SETTLED ESTATES ACT.

Sale of infant's estate under—Appointment of guardian:

In re Ash Estate, 5 Brit. Col. L. R. 672.

SETTLEMENT OF ACTION.

Validity of—Trial—Issue—Action—Pleading:

Davidson v. *Meritton Wood and Pulp Co.*, 240; 18 P. R. 139.

See Solicitor 1, 7, 12.

SEVERANCE.

See Fixtures, 2.

SHARES.

See Company, 2, 6, 8, 9, 11, 20—Principal and Agent, 2.

SHERIFF.

1. Action against—Replevin for goods taken in execution:

Mulcahy v. *Archibald*, 30 N. S. Reps. 121.

2. Duty of —Replevin bond—Exhibiting to defendant:

Logue v. *Prescott*, 186.

See Bankruptcy and Insolvency, 8, 10, 18—Bills of Sale and Chattel Mortgages, 1—Costs, 34—Execution, 3.

SHIP.

1. Mortgage—Power of sale—Invalid exercise—Account—Costs:

Kennedy v. *Nealis*, 17 Occ. N. 341; 1 N. B. Eq. Reps. 455.

2. Sale—Unregistered lien—Notice—Merchant Shipping Act, 1894 (Imp.):

Luffman v. *Luffman*, 50; 25 A. R. 48.

See Crown, 8—Insurance, 24-27—Maritime Law—Negligence, 3—Replevin.

SHORT FORMS ACT.

See Deed 5.

SLANDER.

Words imputing unnatural offence—Innuendo—Meaning of words spoken—Knowledge of persons to whom words spoken—Evidence:

Gates v. *Lohnes*, 31 N. S. Reps. 221.

See Libel—Libel and Slander—Pleading, 10.

SMALL DEBTS COURT.

See Prohibition, 16.

SOLICITOR.

1. Action for costs—Defence of Statute of Limitations—Time of commencement of statutory period—Settlement by client of action in which costs incurred—Retainer—Defence that solicitor not certificated—Pleading—Proof—56 V. c. 27 (N.S.)—Retroactivity:

Gourley v. *McAloney*, 29 N. S. Reps. 319.

2. Admission to practise in British Columbia—Previous admission in other provinces—Service under articles:

Gwillim v. *Law Society of British Columbia*, 6 Brit. Col. L. R. 147.

3. Authority to accept service after judgment:

Hamilton v. *Stewiacke R. W. Co.*, 30 N. S. Reps. 92.

4. Charging order—Infant plaintiff—Action for personal injuries—Lien on taxed costs—Sale of judgment:

Nevills v. *Ballard*, 238; 18 P. R. 134.

5. Charging order—Rule 1129—"Property"—Judgment—Assignment—Notice—Taxation of costs—Sale of judgment—Form of charging order:

Orford v. *Fleming*, 142, 241.

6. Costs—Taxation—Discretion of local officer—Increased counsel fees:

In re Solicitor, 337; 18 P. R. 184.

7. Lien—Settlement of action—Notice—Collusion—Fruits of litigation—Ascertainment of amount due solicitor—Collateral proceeding:

Walker v. *Gurney-Tilden Co.*, 401.

8. Negligence—Liability for loss of promissory note given him for collection—Damages—Measure of—Liability for loss by client in suing on promissory note paid to solicitor—Burden of proof—Conflicting evidence:

Gould v. *Blanchard*, 29 N. S. Reps. 361.

9. Practising without qualification—Legal Professions Act, 1895, ss. 68, 72—Contempt of Court—Evidence to shew offence:

In re C., 5 Brit. Col. L. R. 530.

10. Retainer—Joint or several—Severance of defence—Apportionment of costs:

In re Solicitors, 307; 18 P. R. 176.

SOLICITOR—*Continued.*

11. Services in Exchequer Court of Canada—Agreement with client—Compensation *en bloc*—Invalidity—Champerty—Account—Jurisdiction of Provincial Court—Ascertainment of proper compensation—Taxation of bill of costs—*Quantum meruit*—Evidence:

O'Connor v. *Gemmill*, 12; 29 O. R. 47.

12. Settlement of action behind the back of plaintiff's solicitor—Good faith—Absence of notice—Leave to solicitor to proceed for costs:

Rideout v. *McLeod*, 6 Brit. Col. L. R. 161.

See Advocate—Affidavit—Bankruptcy and Insolvency, 20—Costs, 36, 45—Distress—Judgment Debtor, 2—Libel, 4—Receiver, 3—Replevin—Service of Papers, 3—Tender.

SPECIAL CASE.

See Costs, 37.

SPECIAL DAMAGE.

See Damages, 2.

SPECIAL INDORSEMENT.

See Writ of Summons, 3, 4.

SPECIFIC PERFORMANCE.

1. Evidence—Corroboration:

Johnston v. *Sullivan*, 329.

2. Evidence — Corroboration — Discretion — Conduct of parties—Costs:

Calhoun v. *Brewster*, 329.

See Contract, 17—Judgment, 13—Street Railways, 1—Vendor and Purchaser, 1.

SPEEDY TRIAL.

See Criminal Law, 24, 29.

SPLITTING DEMAND.

See Prohibition, 11.

STAMPS.

See Law Stamps.

STATED CASE.

See Appeal, 52—Arbitration and Award, 3—Indian—Parliamentary Elections, 1—Res Judicata.

STATEMENT OF CLAIM.

See Pleading, 11, 12.

STATEMENT OF DEFENCE.

See Pleading, 6, 13-18.

STATUTE OF ELIZABETH.

See Bankruptcy and Insolvency, 9, 13, 17, 18—Particulars, 2.

STATUTE OF FRAUDS.

See Bailment—Bankruptcy and Insolvency, 2—Contract, 18—Master and Servant, 4—Partnership, 4—Pleading, 3—Sale of Goods, 8.

STATUTES.

1. Amendment—Coal Mines Regulation Act, B.C., s. 4—Prohibition, as to employment of certain persons in mines—Addition, by amendment, of new class of persons—Omission to provide penalty in amending Act—Construction of penal Act—Interpretation Act—Summary conviction—Motion to quash:

   Reg. v. *Little*, 6 Brit. Col. L. R. 78.

2. Amendment—Incorporation, by reference, of one statute in another—Subsequent amendment of incorporated statute—Effect of:

   McKenzie v. *Jackson*, 31 N. S. Reps. 70.

3. Amendment—Retroactive effect—Limitation of actions—54 V. c. 42, s. 16—Claims for compensation—Expropriation of land by municipality:

   In re Roden and City of Toronto, 54; 25 A. R. 12.

4. British Columbia Game Protection Acts—Prohibition against purchasers having game in possession with intent to export—Limitation to game killed within the Province—Exemption—Proviso or exemption—Negativing—Burden of proof:

   Reg. v. *Strauss*, 5 Brit. Col. L. R. 486.

5. Division of sections into sub-sections—Effect of—Packing of railway frogs—Railway Committee of Privy Council:

   Washington v. *Grand Trunk R. W. Co.*, 125; 28 S. C. R. 184.

6. Effect of statute on pending action—Right of appeal—Separation of Yukon Territory from North-West Territories:

   Flaschaert v. *Kleinschmidt*, 427.

7. Imperative or directory—Drainage Act, 1894, s. 93, s.-s. 3:

   Thackeray v. *Township of Raleigh*, 236; 25 A. R. 226.

STATUTES—*Continued.*

8. Imperative or directory—"May"—Performance of judicial act—Criminal Code, s. 880 (*e*):

Fenson v. *City of New Westminster*, 5 Brit. Col. L. R. 624.

9. Limitation of right of appeal—Application to pending cases:

Hyde v. *Lindsay*, 373.

10. Ontario Insurance Act—Construction—Enabling statute:

Styles v. *The Supreme Council of the Royal Arcanum*, 19; 29 O. R. 38.

11. Ontario Insurance Act—Retroactivity—Life insurance:

Videan v. *Westover*, 17; 29 O. R. 1.

12. Retroactivity—Provision for registration of alimony decree—Application to previously existing decree:

Foulds v. *Foulds*, 384.

13. Retroactivity—Right of appeal affected—Procedure:

Koksilah Quarry Co. v. *The Queen*, 5 Brit. Col. L. R. 600.

14. Retroactivity—Solicitor—Practising without certificate—Bills incurred before statute:

Gourley v. *McAloney*, 29 N. S. Reps. 319.

15. Singular read as plural—"Preceding section"—Mines Act, 52 V. c. 23, s. 8 (N.S.):

Attorney-General v. *Temple*, 29 N. S. Reps. 279.

16. Repeal—Special Ordinance, N. W. T.—General Ordinance:

In re City of Calgary and Steen, 282.

17. R. S. O. 1887 c. 194, s. 4—"Sale or other disposal"—Gift of intoxicating liquor:

Reg. v. *Walsh*, 10; 29 O. R. 36.

See Appeal, 47—Game.

STATUTORY DECLARATION.

See Criminal Law, 20.

STAY OF PROCEEDINGS.

Discretion of Judge at Chambers—Mortgage action—Sale under decree—Agreement between parties—Stay to enable rights to be ascertained:

Auchterlony v. *Palgrave Gold Mining Co.*, 29 N. S. Reps. 414.

See County Courts, 4.

STIFLING PROSECUTION.

See Contract, 2, 19—Duress, 2.

STIPENDIARY MAGISTRATE.

See Canada Temperance Act, 3—Liquor License Act, 3—Summary Conviction, 3.

STOCK EXCHANGE.

See Principal and Agent, 2.

STOCK JOBBING.

See Principal and Agent, 2.

STREAM.

See Water and Watercourses.

STREET RAILWAYS.

1. Contract—Running cars—Specific performance—Injunction—Mandamus—Declaration:

City of Kingston v. *Kingston, etc., Electric R. W. Co.*, 397.

2. Ejection of passenger—Misconduct—Placing foot on cushion—Assault:

Davis v. *Ottawa Electric R. W. Co.*, 17 Occ. N. 168; 28 O. R. 654.

3. Footboard on side of car—Invitation to stand on—Improper construction of bridge—Negligence—Excessive damages—New trial:

Fraser v. *London Street R. W. Co.*, 259; 29 O. R. 411.

4. Negligence—Injury to pedestrian—Infirm person—Evidence:

Haight v. *Hamilton Street R. W. Co.*, 173; 29 O. R. 279.

See Assessment and Taxes, 11—Company, 10—Damages, 4—Discovery, 4—Jury, 1—Master and Servant, 4.

SUBPŒNA.

See Discovery, 3, 9—Evidence, 12.

SUBSCRIPTION.

See Company, 9, 11.

SUCCESSION DUTY.

See Revenue.

SUMMARY CONVICTION.

1. Allowance of costs—Excess of jurisdiction—Criminal Code, s. 871—Quashing conviction—Canada Temperance Act:

Ex p. Rayworth, 34 N. B. Reps. 74.

SUMMARY CONVICTION—*Continued.*

2. Fine—Imprisonment in default of payment—No attempt to enforce by distress:

   Reg. v. *Petersky*, 5 Brit. Col. L. R. 549.

3. Liquor License Act—Third offence against—Form of conviction—Power of stipendiary magistrate to vary—Amendment of summons in absence of defendant — Quashing conviction—Costs:

   Reg. v. *Grant*, 30 N. S. Reps. 368.

4. Motion to quash— Right of Court to look at evidence where conviction valid on its face:

   Reg. v. *Hughes*, 106; 29 O. R. 179.

5. Penalty—Adjudication of payment instead of forfeiture:

   Reg. v. *Crowell*, 29.

6. Removal by *certiorari*—Erroneous finding of fact by magistrate —Power of Court to review—Liquor License Act:

   Reg. v. *Walsh*, 29 N. S. Reps. 521.

7. Rule *nisi* to quash—Death of prosecutor—Effect of :

   Reg. v. *Fitzgerald*, 134; 29 O. R. 203.

8. Using abusive language—Jurisdiction of single justice—Motion to quash—Costs, where unopposed—Terms as to bringing no action:

   Reg. v. *McLeod*, 30 N. S. Reps. 191.

9. Variance from information—Clerical error—Quashing conviction :

   Reg. v. *Dibblee—Ex p. Kavanagh*, 34 N. B. Reps. 1.

10. Wilfully killing a dog—Penalty—Imprisonment in default— —Hard labour—Power to impose—Criminal Code, ss. 501, 872 (*b*):

    Reg. v. *Horton*, 27.

See Canada Temperance Act—Certiorari, 1, 2, 4, 5—Costs, 17, 18, 46—Indian—Justice of the Peace—Liquor License Act —Police Magistrate—Prohibition, 5—Statutes, 1.

SUMMARY JUDGMENT.

See Judgment, 14-18—Pleading, 13.

SUMMARY ORDER.

See Costs, 39.

SUMMARY TRIAL.

See Police Magistrate, 2.

SUMMONS.

See Company, 10, 13—Costs, 15—County Courts, 6—Division Courts, 1—Judgment, 17—Law Stamps—Service of Papers, 3—Summary Conviction, 3—Writ of Summons.

SUNDAY.

Lord's Day observance—Municipal by-law—Unreasonableness:

Reg. v. *Petersky*, 5 Brit. Col. L. R. 549.

See Constitutional Law, 4—Liquor License Act, 6—Municipal Corporations, 8.

SUPERANNUATION.

See Crown, 1.

SUPREME COURT OF CANADA.

1. Jurisdiction—*Habeas corpus*—R. S. C. c. 135, s. 32:

Reg. v. *Macdonald* (or *Ex p. Macdonald*), 17 Occ. N. 412; 27 S. C. R. 683.

2. Jurisdiction—Petition to set aside judgment—Fraud:

Durocher v. *Durocher*, 17 Occ. N. 391; 27 S. C. R. 634.

See Appeal, 34-53—Judgment, 10.

SURETY.

See Pleading, 5—Principal and Surety.

SURGEON.

See Medical Practitioner, 2.

SURROGATE COURTS.

1. Jurisdiction—Liability for succession duty:

In re Renfrew Estate, 194, 324; 29 O. R. 565.

2. Removal of cause into High Court—Appeal from order made before removal:

Justin v. *Goodison*, 306; 18 P. R. 174.

See Appeal, 30—Costs, 20—Probate Courts.

TAX SALE.

See Assessment and Taxes, 4, 3—Mortgage, 11—Pleading, 7.

TAXATION OF COSTS.

See Arbitration and Award, 1—Costs, 14, 25, 40-42—Solicitor, 4, 5, 6, 11.

TAXES.

See Assessment and Taxes.

TELEPHONE COMPANY.

See Assessment and Taxes, 10—Municipal Corporations, 32.

TENANT.

See Landlord and Tenant.

TENANT AT WILL.

See Limitation of Actions, 2.

TENANT FOR LIFE.

See Waste.

TENANTS IN COMMON.

See Improvements on Land—Landlord and Tenant, 9—Lien, 2—Limitation of Actions, 4.

TENDER.

Placing money in bank to credit of defendant's solicitor, not a good tender of costs—Waiver of formalities of tender—Silence:

Dunlop v. *Haney*, 6 Brit. Col. L. R. 185.

THEFT.

See Criminal Law, 4, 9, 28, 29.

THIRD PARTIES.

See Costs, 43—Notice of Trial, 1—Parties, 7, 8.

THREATENING LETTER.

See Criminal Law, 31.

THREATS.

See Criminal Law, 30—Duress.

TIMBER.

See Crown Lands, 1, 3—Fine, 2—Mortgage, 14.

TIME.

Abridgement of—Month's notice of intention to proceed—Urgent need for examination of witness *de bene esse*:

Bank of Montreal v. *Horne*, 6 Brit. Col. L. R. 68.

See Appeal, 2, 8, 9, 11, 14, 22, 27, 32, 42—Arbitration and Award, 1—Arrest, 1, 10—Bankruptcy and Insolvency, 18—Benefit Societies—Costs, 41—Criminal Law, 27—Dower, 2—Insurance, 6—Judgment, 16—Landlord and Tenant, 5—Lien, 3—Mines and Minerals, 1—Money in Court, 2—Municipal Corporations, 1, 9, 22, 30, 43 — Parties, 11—Pleading, 4, 13, 15—Prohibition, 2—Railways and Railway Companies, 3—Sale of Land, 2, 3—Solicitor, 1.

TITLE TO LAND.

See Appeal, 53—Boundaries—Evidence, 13—Pleading, 2—Sale of Land, 6—Trespass to Land.

TOLLS.

See Way, 6.

TORT.

See Parties, 4—Prohibition, 13.

TRADE-MARK.

1. Fancy name—Validity of—Injunction:

Radam v. *Shaw*, 17 Occ. N. 415; 28 O. R. 612.

2. Infringement—Use of particular word in advertising—"Fly poison pad:"

Wilson v. *Lyman*, 232; 25 A. R. 303.

3. Registration—Refusal to register—R. S. C. c. 63, s. 11—Resemblance between trade-marks:

In re Melchers and De Kuyper, 227; 6 Ex. C. R. 82.

TRADES-UNIONS.

1. Combination in restraint of trade—Preventing non-union workmen from obtaining employment—Action for damages:

Perrault v. *Gauthier*, 213; 28 S. C. R. 241.

2. Expulsion of member—Fine—Deprivation of benefits—Conspiracy—Remedy—Action—Bar—R. S. C. c. 131, s. 4—Libel—Malice—Privilege:

Beaulieu v. *Cochrane*, 108; 29 O. R. 151.

TRADING CORPORATION.

See Company, 4, 12.

TRAINER'S LIEN.

See Lien, 1.

TRANSFER OF ACTION.

See County Courts, 1.

TRESPASS TO GOODS.

See Damages, 9—Justice of the Peace, 6—Sale of Goods, 4.

TRESPASS TO LAND.

1. Defendant claiming title by adverse possession—Necessity for pleading Statute of Limitations—Disseisin—Question for jury—Action by disseised party maintainable—Entry—Payment of rent:

Miller v. *Wolfe*, 30 N. S. Reps. 277.

TRESPASS TO LAND—*Continued.*

2. Foreshore of sea—Rights of owner of adjacent land—Right to gather seaweed—Way of necessity—Impassable public highway:

Young v. *McIsaac*, 42.

See Costs, 23—Crown Lands, 2—Railways and Railway Companies, 13—Sale of Land, 4—Water and Watercourses, 8.

TRESPASS TO PERSON.

Constable—Warrant—Arrest in wrong county—Good faith—Protection of constable—R. S. O. 1887 c. 73—Notice of action—Insufficiency of—Pleading—"Not guilty by statute"—Amendment:

Alderich v. *Humphrey*, 172; 29 O. R. 427.

See Arrest, 6—Pleading, 19.

TRIAL.

1. Finding of trial Judge on conflicting evidence—Interfering with—Sufficiency of finding—Power of Court to set aside:

Knock v. *Knock*, 29 N. S. Reps. 267.

2. Jury—Cross-examining questions put to—Right to find general verdict:

Steves v. *District of South Vancouver*, 6 Brit. Col. L. R. 17.

3. Jury—Findings of—Judgment of trial Judge—Power to enter against findings of jury—Duty of trial Judge—Direction to jury—Construction of contract:

Macdonald v. *Trustees of Pandora Street Methodist Church*, 5 Brit. Col. L. R. 521.

4. Jury—Inconsistent findings—Evidence—New trial:

Snow v. *Fraser*, 30 N. S. Reps. 80.

5. Jury—Inconsistent findings—Misdirection—New trial—Pleading:

Cowans v. *Marshall*, 127; 28 S. C. R. 161.

6. Jury notice—Striking out—Duty of Judge presiding at jury sittings—Transfer to non-jury list:

Bank of Toronto v. *Keystone Fire Ins. Co.*, 217; 18 P. R. 113.

7. Order for trial without jury—Subsequent jury notice—Effect of—Defendant taking his chances at trial—Motion to set aside judgment:

Alexander v. *Baker*, 30 N. S. Reps. 443.

TRIAL—*Continued.*

8. Postponement—Refusal—Discretion—Interference on appeal:
Duffy v. *Adams*, 30 N. S. Reps. 197.

9. Powers of local Judge—Judgment—Nullity—Appeal from—Motion to rescind—Costs:
Brigman v. *McKenzie*, 6 Brit. Col. L. R. 56.

10. Right of Court to supply finding where answer of jury defective—Questions left to jury—Formal offer of—Setting aside verdict—Misdirection—Substantial wrong or miscarriage:
McLeod v. *Insurance Co. of North America*, 30 N. S. Reps. 480.

11. Right to jury—Action for injunction:
Canadian Pacific R. W. Co. v. *Parke*, 5 Brit. Col. L. R. 507.

12. Right to reply—Erroneous refusal of—New trial nevertheless refused:
Quintal v. *Chalmers*, 316; 12 Man. L. R. 231.

See Amendment 5—Costs, 1—County Courts, 5—Courts, 2—Criminal Law, 32—Demurrer—Division Courts, 2—Judgment, 19—Jury Notice—New Trial—Notice of Trial—Particulars, 1—Pleading, 3—Police Magistrate, 2—Prohibition, 2, 12—Settlement of Action—Vacation—Venue.

TRIAL JUDGE.

See Costs, 4, 5, 6, 43—Criminal Law, 7—Jury Notice, 2—Sale of Land, 6—Trial—Way, 2.

TRUSTS AND TRUSTEES.

1. Account of trust funds—Abandonment by *cestui que trust*—Evidence—Interest—Costs—Appeal:
Jones v. *McKean*, 34 N. B. Reps. 44; 27 S. C. R. 249; 17 Occ. N. 183.

2. Liability of trustee for misappropriation of funds by co-trustee:
Crowe v. *Craig*, 29 N. S. Reps. 394.

3 Misappropriation of funds by trustee—Knowledge of *cestui que trust*—Duty to comunicate to sureties—Action against sureties—Parties—Necessity for joining *cestui que trust*:
Eastern Trust Co. v. *Forrest*, 30 N. S. Reps. 173; *Bayne* v. *Eastern Trust Co.*, 28 S. C. R. 606.

4. Remuneration of trustee—Allowance of—Costs:
Scarry v. *Wilson*, 294; 12 Man. L. R. 216.

TRUSTS AND TRUSTEES—*Continued.*

5. Remuneration of trustees—Commission on income and investments:
In re Eaton (Aaron) Estate, 1 N. B. Eq. Reps. 527.

6. Trust deed — Estate taken by trustees — Beneficiaries—New trustee—Appointment—Injunction:
Armstrong v. *Harrison*, 112; 29 O. R. 174.

7. Trust to sell for best price—Power of sale coupled with trust—Will—Discretion of trustees—Right of Court to enforce trust:
Clark v. *Keefer*, 259; 29 O. R. 557.

See Bankruptcy and Insolvency, 19—Bills of Sale, 6—Constitutional Law, 1—Contract, 19—Costs, 44—Executors and Administrators, 5—Infant, 5, 6—Insurance, 5—Partnership, 4—Railways and Railway Companies, 14—Schools, 2—Will, 1, 9, 12.

ULTRA VIRES.

See Company, 6—Constitutional Law — Municipal Corporations, 14—Schools, 1.

UNDERTAKING.

See Injunction, 3, 4.

UNNATURAL OFFENCE.

See Criminal Law, 33—Slander.

UPPER CANADA IMPROVEMENT FUND.

See Constitutional Law, 1.

VACATION.

Trial pending—Adjournment—Rule 736 (*d*):
Gill v. *Ellis*, 6 Brit. Col. L. R. 157; *Green* v. *Stussi*, *ib.* 193.

See Judgment, 19.

VALUING SECURITIES.

See Bankruptcy and Insolvency, 11.

VENDOR AND PURCHASER.

1. Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact:
Murray v. *Jenkins*, 335; 28 S. C. R. 565.

2. Sale of land—Conveyance without covenant for title—Failure of title—Recovery of purchase money—Absence of wilful misrepresentation:
Pope v. *Cole*, 6 Brit. Col. L. R. 205.

VENDOR AND PURCHASER—*Continued.*

3. Sale of leased premises—Termination of lease—Damages:
Alley v. *Canada Life Assurance Co.*, 28 S. C. R. 608.

See Deed, 1—Insurance, 5—Mortgage, 11-13—Parties, 1—Sale of Land.

VENDOR'S LIEN.

See Lien, 2.

VENUE.

1. Change of—Cause of action—Convenience—Expense—Right of plaintiff:
Campbell v. *Doherty*, 377; 18 P. R. 243.

2. Change of—Criminal trial—Fair trial—Evidence as to:
Reg. v. *Ponton*, 365; 18 P. R. 210.

3. Change of—Preponderance of convenience—View—Fair trial—Appeal:
Biggar v. *City of Victoria*, 6 Brit. Col. L. R. 130.

See Costs, 21.

VIEW.

See Venue, 3.

VOLUNTARY CONVEYANCE.

See Bankruptcy and Insolvency, 4—Fraudulent Conveyance, 2.

WAGER POLICY.

See Insurance, 21, 23.

WAGES.

See Attachment of Debts, 2—Municipal Corporations, 4.

WAIVER.

See Appeal, 8, 13, 31—Bills of Exchange and Promissory Notes, 3—Constitutional Law, 7—Covenant—Insurance, 1, 23, 26—Municipal Elections—Notice of Trial, 2—Parliamentary Elections, 3—Prohibition, 4—Sale of Land, 5—Tender—Writ of Summons, 1.

WAREHOUSE RECEIPTS.

See Bankruptcy and Insolvency, 1.

WARRANT.

See Criminal Law, 1, 19, 30—Trespass to Person.

WARRANTY.

See Deed, 1, 7.

WASTE.

Permissive waste—Growth of weeds—Tenant for life—R. S. O. 1887 c. 202:

Patterson v. *Central Canada L. & S. Co.*, 81, 111; 29 O. R. 134.

WATER AND WATERCOURSES.

1. Injury to railway by diversion of stream—Rights of owners of recorded water privileges—Absence of negligence—Injunction—Damages:

Canadian Pacific R. W. Co. v. *Parke*, 6 Brit. Col. L. R. 6.

2. Interference with navigation—Private right of action for damages—Special interest:

Drake v. *Sault Ste. Marie Pulp and Paper Co.*, 232; 25 A. R. 251.

3. Navigation—Carriage of ice—Right to cut passage through harbour:

Macdonald v. *Lake Simcoe Ice and Cold Storage Co.*, 178; 29 O. R. 247.

4. Riparian owners—Soil of stream—Erection of dams—"Any other obstruction"—R. S. O. 1887 c. 120, s. 1:

Farquharson v. *Imperial Oil Co.*, 135; 29 O. R. 206.

5. Riparian rights—Dams—Flooding land—Injunction—Damages—Estoppel—Acquiescence—Leave and license—Husband and wife:

Wright v. *Mitten*, 34 N. B. Reps. 14.

6. Surface water—Easement—Adjoining properties of land—Difference in levels:

Ostram v. *Sills*, 285; 28 S. C. R. 485.

7. Surface water—Lands of different levels—Absence of a marked channel—Right to stop flow of water on to one's own land:

Wilton v. *Murray*, 37; 12 Man. L. R. 35.

8. Trespass—Right of landowner to relieve himself of flooding by backing water on adjoining lands—Pleading:

Canadian Pacific R. W. Co. v. *McBryan*, 6 Brit. Col. L. R. 136.

See Ditches and Watercourses.

WATERWORKS.

See Municipal Corporations, 3, 43, 44—Parties, 1.

WAY.

1. Easement—Way of necessity—Physical inaccessibility—Convenience:

Fitchett v. *Mellow*, 15; 29 O. R. 6.

WAY—*Continued.*

2. Easement—Winter road—Appurtenant way—Necessary way—Implied grant—Landlocked tenement—User—Evidence of—Prescription—Discontinuous user — Contentious user—Obstruction—Interruption of prescription — Acquiescence—Limitation of actions—Character of land and occupation—Presumption from—Finding of trial Judge on conflicting evidence—Interfering with—Sufficiency of finding—Power of Court to set aside:
   Knock v. *Knock*, 17 Occ. N. 411; 29 N. S. Reps. 267; 27 S. C. R. 664.

3. Impassable public highway—Way of necessity:
   Young v. *McIsaac*, 42.

4. Reservation of—Grant—Description—Want of *terminus ad quem*—Easement—Extinguishment by unity of possession and title—Evidence — Continuous user — Pleading—Amendment:
   McDonald v. *McDougall*, 30 N. S. Reps. 298.

5. Right of—Prescription—Termini—Slight deviations—Interruptions—Appeal—Admission of new evidence—Erection of gate across way:
   Warren v. *Van Norman*, 66, 290; 29 O. R. 84, 508.

6. Toll road—Municipal corporation—Power to lease toll road to individual—Tolls—16 V. c. 190, s. 26—Practice—Appeal—Divisional Court:
   Payne v. *Caughell*, 17 Occ. N. 413; 24 A. R. 556.

See Deed, 4—Easement, 2—Landlord and Tenant, 15—Municipal Corporations, 24-37—Trespass to Land, 2.

WEEKLY COURT.

See Courts, 3.

WIDOW'S CHARGE.

See Devolution of Estates Act, 3.

WIDOW'S ELECTION.

See Dower, 2.

WILL.

1. Charitable devise—Trust for benefit of citizens of the United States of African descent—Trust to be executed in a foreign country:
   Lewis v. *Doerle*, 230; 25 A. R. 206.

2. Construction—Bequest to certain persons and their issue, share and share alike—*Per stirpes* or *per capita*—Executors—Compensation of—Provision by codicil — Words inconsistent with will:
   In re Bossi, 5 Brit. Col. L. R. 446.

WILL—*Continued.*

3. Construction—Change in law—"Heir"—Primogeniture—14 & 15 V. c. 6—43 V. c. 14, s. 2:
   Sparks v. *Wolff*, 286; 25 A. R. 326.

4. Construction—Direction to invest—"Proceeds"—"Income"—"Interest"—Life estate:
   Chubbock v. *Murray*, 30 N. S. Reps. 23.

5. Construction—Estate tail — Executory devise over—"Lawful heirs"—Meaning of—Children or issue—Wills Act, R. S. N. S., 5th ser., c. 89—Statutes abolishing estates tail—Construction of—Estates in remainder expectant—Conversion of estate tail into fee simple:
   Zwicker v. *Ernst*, 29 N. S. Reps. 258; *Ernst* v. *Zwicker*, 27 S. C. R. 594.

6. Construction—Gift to charities—Validity—Legacies—Deduction of legacy duty—"Protestant charitable institutions:"
   Manning v. *Robinson*, 262; 29 O. R. 483.

7. Construction—"My own right heirs"—Limited testamentary power of devisee—Conditional limitations—Vesting of estate:
   In re Ferguson—Bennett v. *Coatsworth*, 101; 28 S. C. R. 38.

8. Constitutional—Specific devise subject to prior life estate—Period of vesting—Advancement—Interest:
   In re Finlayson, Finlayson v. *Keith*, 5 Brit. Col. L. R. 517.

9. Construction—Words of request—Precatory trust:
   Renehan v. *Malone*, 1 N. B. Eq. Reps. 506.

10. Devise—Charitable use—Gift to a bishop in trust for his diocese—Mortmain:
    In re McCauley, 17 Occ. N. 404; 28 O. R. 610.

11. Devise—Limitation—"Without lawful heirs begotten"—Estate tail:
    In re Brown and Campbell, 180; 29 O. R. 402.

12. Devise to two persons in trust as executors—Renunciation of probate by one—Disclaimer of trust—Whole estate vested in the other trustee—Devolution of Estates Act—Application of:
    In re Hewett and Jermyn, 192; 29 O. R. 383.

13. Legacy—Abatement—Deficiency of assets:
    Lindsay v. *Waldbrook*, 17 Occ. N. 393; 24 A. R. 604.

14. Legacy—Charitable bequest—Cy-pres doctrine—Inquiry:
    Murphy v. *Monastery, etc., of the Precious Blood*, 225.

WILL -*Continued.*

15. Legacy—Devise of land—Payment of legacy out of rents and profits—Charge—Arrears—Action to recover—Limitation of actions—Receiver:
Callaghan v. *Howell*, 169; 29 O. R. 329.

16. Legacy—Specific amount — Specific source — Larger amount from specific source:
In re Sherlock, 17 Occ. N. 401; 28 O. R. 638.

See Absconding Debtor—Appeal, 21—Contract, 17—Costs, 2—Dower, 2—Executors and Administrators, 2, 5—Insurance, 12, 15, 17, 20—Prohibition, 9—Trusts and Trustees, 7.

WINDING-UP.

See Company, 13-20—Execution, 4.

WITNESSES.

See Contempt of Court—Criminal Law, 22—Discovery, 10—Evidence, 2, 7—Libel, 1.

WOODMEN'S LIEN.

See Lien, 3.

WORDS.

"Any other obstruction"—See Water and Watercourses, 4.
"Appeal"—See Costs, 18.
"Assigns"—See Insurance, 5.
"Co-insurance"—See Insurance, 4.
"Court of last resort created under Provincial legislation"—See Appeal, 39.
"Court of Record"—See Police Magistrate, 2.
"Disposing of"—See Landlord and Tenant, 2.
"Foreman"—See Mines and Minerals, 8.
"Forthwith"—See Costs, 26.
"Good Cause"—See Costs, 6.
"Goods, Credits, Effects, and Choses in Action"—See Absconding Debtor.
"Heir"—See Will, 3.
"Income"—See Will, 4.
"In front of"—See Deed, 2.
"Insolvent"—See Bankruptcy and Insolvency, 21.
"Instrument"—See Municipal Corporations, 10.
"Interest"—See Will, 4.
"Invalid against creditors"—See Bankruptcy and Insolvency, 1.
"Knowingly and wilfully"—See County Courts, 6—Law Stamps.
"Lawful heirs"—Will, 5.
"Mere slip"—See Judgment, 8.
"My own right heirs"—See Will, 7.
"Not accrued due"—See Bankruptcy and Insolvency, 23.
"Not just and reasonable"—See Insurance, 4.

WORDS—*Continued.*
" On any public work "—See Contract, 10.
" One day's notice "—See Costs, 41.
" Ordinary beneficiary "—See Insurance, 15.
" Other matters and things "—See Appeal, 35.
" Penalty "—See Canada Temperance Act, 2.
" Pending trial "—See Judgment, 19.
" Proceeds "—See Will, 4.
" Protestant Charitable Institutions "—See Will, 6.
" Regulating and governing "—See Municipal Corporations, 6.
" Renewed contract "—See Insurance, 16.
" Sale "—See Canada Temperance Act, 7.
" Sale or other disposal "—See Liquor License Act, 6.
" Settlement "—See Principal and Agent, 2.
" Stock jobbing "—See Principal and Agent, 2.
" Unable to pay debts in full "—See Bankruptcy and Insolvency, 21.
" Without lawful heirs begotten "—See Will, 11.

WORK AND LABOUR.

See Contract, 20—Mechanics' Liens, 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See Master and Servant, 1—Railways and Railway Companies, 11.

WRIT OF ATTACHMENT.

See Appeal, 13.

WRIT OF CERTIORARI.

See Certiorari.

WRIT OF EXTENT.

See Crown Bond.

WRIT OF SUMMONS.

1. Service—Irregularity—Appearance under protest — Waiver—Practice:
Dominion Coal Co. v. *Kingswell S. S. Co.*, 30 N. S. Reps. 397.

2. Service on foreign corporation—Agent in the jurisdiction:
Tytler v. *Canadian Pacific R. W. Co.*, 327; 29 O. R. 654.

3. Special indorsement—Action on guaranty — Consideration—Necessary allegations—Amendment:
Johnson v. *Fitzgerald*, 17 Occ. N. 200; 29 N. S. Reps. 339.

4. Special indorsement—Sufficiency of, to sustain default judgment:
Hassard v. *Riley*, 6 Brit. Col. L. R. 167.

See Arbitration and Award, 1—Judgment, 3—Jurisdiction—Pleading, 11.